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A TREATISE

ON THE

AMERICAN LAW RELATING TO MINES AND MINERAL LANDS

WITHIN THE

PUBLIC LAND STATES AND TERRITORIES

AND

GOVERNING THE ACQUISITION AND ENJOYMENT OF MINING RIGHTS IN LANDS OF THE PUBLIC DOMAIN

BY

CURTIS H. LINDLEY
Of the San Francisco Bar

THIRD EDITION

IN THREE VOLUMES

VOLUME II

"I hold every man a debtor to his profession; from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and ornament thereto."

Bacon's Tracts.

"Et opus desperatum, quasi per medium profundum euntes, cœlesti favore jam adimplevimus."

—From Dedication of Justinian's Institutes.

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CHAPTER II.

LODE CLAIMS, OR DEPOSITS "IN PLACE."

ARTICLE I. INTRODUCTORY.
II. THE LOCATION AND ITS REQUIREMENTS.
III. THE DISCOVERY.
IV. THE DISCOVERY SHAFT AND ITS EQUIVALENT.
V. THE PRELIMINARY NOTICE AND ITS POSTING.
VI. THE SURFACE COVERED BY THE LOCATION—ITS FORM AND RELATIONSHIP TO THE LOCATED LODE.
VII. THE MARKING OF THE LOCATION ON THE SURFACE.
VIII. THE LOCATION CERTIFICATE AND ITS CONTENTS.
IX. THE RECORD.
X. CHANGE OF BOUNDARIES AND AMENDED OR ADDITIONAL LOCATION CERTIFICATES.
XI. RELOCATION OF FORFEITED OR ABANDONED CLAIMS.
XII. LODES WITHIN PLACERS.

ARTICLE I. INTRODUCTORY.

§ 322. Introductory.
§ 323. The metallic or nonmetallic character of deposits occurring in veins as affecting the right of appropriation under the laws applicable to lodes.

§ 322. Introductory.—In the preceding chapters of this work, it has been demonstrated that only the public mineral lands of the United States may be appropriated under the mining laws.[1] While it is true that the words "public lands" are not always used in the same sense and their true meaning and effect are to be determined by the context in which they are used,[2] yet, generally speaking, by "public lands" is meant such as are subject to sale or disposal under

[1] *Ante*, § 112.

[2] United States v. Blendauer, 128 Fed. 910, 913, 63 C. C. A. 636; United States v. Denver & Rio Grande Ry. Co., 190 Fed. 825, 847.

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general laws.[3] Land to which any claims or rights of others have attached does not fall within the designation of "public lands."[4] As was said by the supreme court of the United States,—

> Public lands belonging to the United States for whose sale or other disposition congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by congressional authority or by an executive withdrawal under such authority, either express or implied.[5]

[3] McFadden v. Mountain View M. & M. Co., 97 Fed. 670, 680, 38 C. C. A. 354; In re Logan, 29 L. D. 395; Nome Transp. Co., 29 L. D. 447; State of Louisiana, 30 L. D. 276.

[4] *Ante*, § 80; Newhall v. Sanger, 92 U. S. 761, 762, 23 L. ed. 769; Bardon v. N. P. R. R., 145 U. S. 535, 538, 12 Sup. Ct. Rep. 856, 36 L. ed. 806; Mann v. Tacoma Land Co., 153 U. S. 273, 283, 14 Sup. Ct. Rep. 820, 38 L. ed. 714; Wilcox v. Jackson, 13 Pet. (U. S.) 498, 510, 10 L. ed. 264; Cameron v. United States, 148 U. S. 301, 309, 13 Sup. Ct. Rep. 595, 37 L. ed. 459; United States v. Tygh Valley Land & L. S. Co., 76 Fed. 693, 694; James v. Iron Co., 107 Fed. 597, 603, 46 C. C. A. 476; Hartman v. Warren, 76 Fed. 157, 160, 22 C. C. A. 30; Kansas Pacific Ry. Co. v. Dunmeyer, 113 U. S. 629, 641, 5 Sup. Ct. Rep. 566, 28 L. ed. 1122; Teller v. United States, 113 Fed. 273, 281, 51 C. C. A. 230; Scott v. Carew, 196 U. S. 100, 110, 25 Sup. Ct. Rep. 193, 49 L. ed. 403; Northern Lumber Co. v. O'Brien, 139 Fed. 614, 616, 71 C. C. A. 598; affirmed on appeal, 204 U. S. 190, 196, 27 Sup. Ct. Rep. 249, 51 L. ed. 438; Union Pacific R. R. Co. v. Harris, 76 Kan. 255, 91 Pac. 68.

[5] Lockhart v. Johnson, 181 U. S. 516, 520, 21 Sup. Ct. Rep. 665, 45 L. ed. 979. See Baca Float No. 3, 30 L. D. 497.

In the nomenclature of the public land laws, the word "withdrawal" is generally used to denote an order issued by the president, secretary of the interior, commissioner of the general land office, or other proper officer, whereby public lands are withheld from sale and entry under the general land laws, in order that presently or ultimately they may be applied to some distinctly public use or disposed of in some special way. Sometimes these orders are not made until there is an immediate necessity therefor, but more frequently the necessity for their being made is anticipated. Hans Oleson, 28 L. D. 25, 31; In re Cox, 31 L. D. 193. For a discussion of executive withdrawals generally, see *ante*, § 200b.

We have also attempted to illustrate[6] the nature and character of the appropriation under laws (other than those exclusively applicable to the acquisition of mineral lands) which operate as a segregation of a given tract from the body of public land, and inhibit its acquisition, although mineral in character, under the mining laws. What constitutes such an appropriation of mineral lands under these last-named laws as will remove them from the category of "public lands" and inhibit their acquisition by other mining claimants can be determined only after an analysis of the law regulating the acquisition of title to such lands. After we shall have outlined the methods provided by law for such acquisition, we shall endeavor to explain fully the nature and extent of the title so acquired, the tenure by which it is held, the property rights flowing therefrom, and the conditions under which such rights may be lost or extinguished. The general statement may here be properly made, however, that a perfected, valid appropriation of public mineral lands, under the mining laws, operates as a withdrawal of the tract from the body of the public domain, and so long as such appropriation remains valid and subsisting the land covered thereby is deemed private property.[7]

[6] *Ante*, §§ 112–219.

[7] Gwillim v. Donnellan, 115 U. S. 45, 49, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15 Morr. Min. Rep. 482; Belk v. Meagher, 104 U. S. 279, 283, 26 L. ed. 735, 1 Morr. Min. Rep. 510; S. C., 3 Mont. 65; McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076, 1077; Iron S. M. Co. v. Campbell, 17 Colo. 267, 29 Pac. 513; Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240, 241; Fisher v. Seymour, 23 Colo. 542, 49 Pac. 30, 33; Garthe v. Hart, 73 Cal. 541, 15 Pac. 93, 94, 15 Morr. Min. Rep. 492; Souter v. Maguire, 78 Cal. 543, 21 Pac. 183; Armstrong v. Lower, 6 Colo. 393; Lebanon M. Co. v. Cons. Rep. M. Co., 6 Colo. 371; Faxon v. Barnard, 4 Fed. 702, 2 McCrary, 44, 9 Morr. Min. Rep. 515; Meydenbauer v. Stevens, 78 Fed. 787, 18 Morr. Min. Rep. 578;

We are now to consider the manner in which public mineral lands containing veins or lodes of quartz or other rock in place may be lawfully appropriated.

§ 323. The metallic or nonmetallic character of deposits occurring in veins of rock in place as affecting the right of appropriation under the laws applicable to lodes.—In defining what constitutes "mineral land" within the meaning of the acts of congress, using that term as the legal equivalent of the various words and phrases of a kindred nature found in the mining laws,[8] we have heretofore treated the subject regardless of the form in which the deposits occur—i. e., whether "of rock in place," as in quartz veins, or not "in place," as in the case of auriferous gravels and other substances encountered in surface beds.[9]

Stratton v. Gold Sovereign M. & T. Co., 1 Leg. Adv. 350; S. C., 89 Fed. 1016, 32 C. C. A. 607; Matoa G. M. Co. v. Chicago Cripple G. M. Co., vol. 178 Min. & Scientific Press, p. 374; Cone v. Roxana G. M. Co. (Colo.), 2 Leg. Adv. 350; Mt. Rosa M. M. & L. Co. v. Palmer, 26 Colo. 56, 77 Am. St. Rep. 245, 56 Pac. 176, 50 L. R. A. 289, 19 Morr. Min. Rep. 696; Kinney v. Fleming, 6 Ariz. 263, 56 Pac. 723, 20 Morr. Min. Rep. 13; Gurney v. Brown, 32 Colo. 472, 77 Pac. 357, 359; affirmed, Brown v. Gurney, 201 U. S. 184, 191, 26 Sup. Ct. Rep. 509, 50 L. ed. 717; Farrell v. Lockhart, 210 U. S. 142, 146, 28 Sup. Ct. Rep. 681, 52 L. ed. 994, 16 L. R. A., N. S., 162; Bradford v. Morrison, 212 U. S. 389, 395, 29 Sup. Ct. Rep. 349, 53 L. ed. 564; Swanson v. Sears, 224 U. S. 180, 32 Sup. Ct. Rep. 455, 56 L. ed. 721; Porter v. Tonopah North Star T. & D. Co., 133 Fed. 756, 758; S. C., on appeal, 146 Fed. 385, 386, 76 C. C. A. 657; Malone v. Jackson, 137 Fed. 878, 880, 70 C. C. A. 216; Reed v. Munn, 148 Fed. 737, 757, 80 C. C. A. 215; Willitt v. Baker, 133 Fed. 937, 947; Zerres v. Vanina, 134 Fed. 610, 614; S. C., in error, 150 Fed. 564, 80 C. C. A. 366; Peoria & Colorado M. & M. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915, 917; Hoban v. Boyer, 37 Colo. 185, 85 Pac. 837; Nash v. McNamara, 30 Nev. 114, 133 Am. St. Rep. 694, 93 Pac. 405, 406, 16 L. R. A., N. S., 168; Moorehead v. Erie M. & M. Co., 43 Colo. 408, 96 Pac. 253, 255.

[8] *Ante*, § 86.

[9] *Ante*, § 95.

The conclusions there reached[10] were intended to apply to all classes of deposits, without any attempt at classification as to form of occurrence. We are now called upon to consider a special class of mineral lands, and to determine to what extent, if any, the metallic or nonmetallic character of the deposits found in veins of rock in place controls the manner in which lands containing them may be appropriated.

The act of July 26, 1866, provided for the acquisition of title to veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, or copper. By necessary intendment it excluded all other classes of metallic substances, as well as all which were nonmetalliferous. The placer law of July 9, 1870, extended the right of entry and patent "to claims usually called 'placers,' including all forms of deposit, excepting veins of quartz or other rock in place."

The act of May 10, 1872, provided in terms for the appropriation of lands containing veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, *lead*, *tin*, copper, or other *valuable deposits*.

This is preserved in the Revised Statutes, which also contain the provisions of the placer law of 1870, heretofore referred to. Therefore, under the existing law we find the classification to be as follows:—

(1) Lands containing veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other *valuable deposits;*[11]

(2) Claims usually called "placers," including all forms of deposit, excepting veins of quartz or other rock in place.[12] And in prescribing the method for

[10] *Ante*, § 98.

[11] Rev. Stats., § 2320; Comp. Stats. 1901, p. 1424; 5 Fed. Stats. Ann. 8.

[12] Rev. Stats., § 2329; Comp. Stats. 1901, p. 1432; 5 Fed. Stats. Ann. 42. For an elaborate discussion of this classification, see Webb v. American

obtaining patents, both classes seem to have been grouped under the term "valuable deposits."[13]

It may be said that, ordinarily, nothing but metalliferous ores are encountered in veins of rock in place. There are, however, exceptions to this rule. Coal occurs in veins, and in many instances with as pronounced dip and strike as in the auriferous quartz lodes. But lands containing coal are sold under special laws.[14] Marble, borax,[15] onyx,[16] asphaltum, gilsonite,[17] or uintaite (a species of asphaltum), gypsum, talc, graphite, rock phosphates,[17a] chalk, marls, oilstones, mica, asbestos, fluorspar, sulphur, and mineral paint are nonmetallic substances, and occur in veins of rock in place.[18] All of these have commercial value, and in many instances yield as much profit in proportion to the cost of exploitation and extraction as the

Asphaltum Co., 157 Fed. 203, 84 C. C. A. 651; Henderson v. Fulton, 35 L. D. 652; Harry Lode M. Claim, 41 L. D. 403.

[13] Rev. Stats., § 2325; Comp. Stats. 1901, p. 1429; 5 Fed. Stats. Ann. 31.

[14] Leonard v. Lennox, 181 Fed. 760, 761.

[15] See McCann v. McMillan, 129 Cal. 350, 62 Pac. 31, 33, 21 Morr. Min. Rep. 6.

[16] Utah Onyx Development Co., 38 L. D. 504.

[17] Webb v. American Asphaltum M. Co., 157 Fed. 203, 84 C. C. A. 651.

[17a] Harry Lode M. Co., 41 L. D. 403.

[18] The circuit court of appeals in Webb v. American Asphaltum Co., *supra*, adopts the reasoning of the text as it appeared in the second edition of this work and applies the rule to a vein of gilsonite similar to the one shown in figure 30a, without, however, referring to the author. The same court applied the same reasoning to a bed of phosphate rock in San Francisco Chemical Co. v. Duffield, 201 Fed. 830, 836. See, *contra*, Duffield v. San Francisco Chemical Co., 198 Fed. 942, decided by a United States district court in another circuit. The land department follows and applies the rule to onyx occurring in veins, holding it to be subject to location as a lode. Utah Onyx Development Co., 38 L. D. 504. Also to well phosphates. Harry Lode M. Claim, 41 L. D. 403.

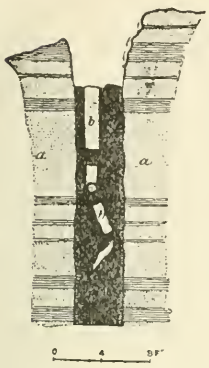


FIGURE 30A.

metalliferous veins. When any of these substances occur in the form of superficial deposits, lands containing them may be appropriated under the placer laws, as they are not veins of rock in place. But suppose they occupy a vertical or pronounced inclined position in the mass of the mountain. A typical illustration showing the occurrence of nonmetallic substances in veins is afforded by the deposits of uintaite, or gilsonite, found in Utah. Figure 30A is a cross-section taken from the monograph of Mr. George H. Eldridge on these deposits.[19] So far as structure is concerned, it exhibits the highest type of a fissure vein, and if the vein-filling or gangue carried metalliferous ores it would respond fully to the scientific as well as popular definition of a true fissure vein. In the illustration the vein occupies practically a vertical position which eliminates from discussion the subject of the extralateral right. But a reading of Mr. Eldridge's monograph shows that in many of these deposits the plane of the vein is inclined, rendering the discussion which follows pertinent. How is this class of deposits to be appropriated? If by the placer laws, and if they are on surveyed lands, they must be taken up in some subdivision of the government surveys. If the deposit should exist in the form of an ideal vein, there would be but one exposure upon which a discovery could be based, and nothing overlying the dip beyond the vertical plane drawn through the surface boundary of, for example, a

[19] U. S. Geological Survey, 17 Ann. Rep., part 1, p. 932.

twenty-acre tract, could be located without discovery, and discovery would be impossible except by sinking vertical shafts at great expense, with no adequate protection in the meanwhile in the possession of the tract.[20] We cannot see, since the act of 1872 was passed increasing the number of terms used in the prior law, that there is any foundation to support the contention that veins or lodes must be metalliferous in order to be appropriated under the lode laws. The extralateral right may be of as much value to the proprietor of a mica, rock phosphate, asphaltum, gilsonite, or talc vein as a gold vein. The act itself in terms makes no distinction based upon the chemical composition of the deposit. But it groups the classes according to the *form* in which the valuable deposits occur. In our judgment, there is no more reason for insisting that veins or lodes of mica, graphite, asphaltum, gilsonite, or other nonmetallic substance in place should be located as placers than it has to require cinnabar deposits to be located as lodes, independently of the form of their occurrence.[21]

This is the view announced by the circuit court of appeals, eighth circuit, involving gilsonite occurring in a vein as indicated in figure 30A, *supra*.[22]

How shall they be appropriated?

The term "deposits" used in section twenty-three hundred and twenty of the Revised Statutes is just as comprehensive as the same term found in section twenty-three hundred and twenty-nine.

The deliberate addition in the statute of the term "valuable deposits" to the enumeration of metallic

[20] Unless, perhaps, we are permitted to rely upon the California doctrine protecting oil placer locators to the full extent of their claims while they are engaged in boring or drilling for oil, discussed in § 218.

[21] Copp's Min. Dec. 47, 60.

[22] Webb v. American Asphaltum Co., 157 Fed. 203, 84 C. C. A. 651.

substances is of itself evidence of the highest character that the intention of the lawmakers was to enlarge the scope of the lode laws, and embrace every character of deposit found in veins of rock in place which fall within the meaning of "mineral" in its broadest sense. If the meaning of the term "valuable deposits" was intended to be restricted to such substances as were metallic in their nature, it is fair to presume that congress would have used the term "valuable metallic or metalliferous deposits."[23] Gold occurs in veins of rock in place, and when so found the land containing it must be appropriated under the laws applicable to lodes. It is also found in placers, and when so found the land containing it must be appropriated under the laws applicable to placers. Iron ore is found in veins of rock in place. It also occurs in beds and superficial deposits.[24] Where it is found in veins, lands containing it must be appropriated under the lode laws. Where it is not found in veins of rock in place, the proceedings to obtain government title are the same as those prescribed for placers.[25]

Iron is not named in the act of 1872, nor in the corresponding section of the Revised Statutes. Prior to the passage of that act, lands containing it were sold the same as agricultural lands. That act, as interpreted by the land department, was comprehensive enough to include iron ore, and thenceforth lands con-

[23] For a discussion of the term "other valuable deposits" and the application of the doctrine *ejusdem generis*, see Nephi Plaster Co. v. Juab County, 33 Utah, 114, 93 Pac. 53, 54, 14 L. R. A., N. S., 1043; Webb v. American Asphaltum M. Co., 157 Fed. 203, 205, 84 C. C. A. 651; Utah Onyx Development Co., 38 L. D. 504.

[24] This illustration used in Nephi Plaster & M. Co., v. Juab County, 33 Utah, 114, 93 Pac. 53, 54, 14 L. R. A., N. S., 1043.

[25] In re Stewart, 1 Copp's L. O. 34; Commissioner's Letter, Copp's Min. Dec. 235; Henderson v. Fulton, 35 L. D. 652; In re McDonald, 40 L. D. 7.

taining such substances were patented only under the mining laws.[26]

The large number of nonmetallic substances mentioned in a previous chapter of this work[27] have been held by the land department to fall within the definition of "mineral" and "deposit," as these terms are used in the mining statutes. True, in the cases wherein this rule was established the substances occurred in the form of superficial deposits. But if it is once determined that they are "mineral" or "valuable deposits," they then become subject to classification for the purpose of appropriation the same as the metallic substances enumerated in the act.[28]

The supreme court of Washington at one time held that in its judgment a mining claim, either placer or lode, could not lawfully exist or be patented unless it contained some of the *metals*,[29] a ruling which it subsequently retracted.[30] Secretary of the Interior Hoke Smith, after criticising the Washington court for its first decision, ruled as follows:—

> It appears to me so plain that congress only contemplated lands that were valuable for the *more precious metals* should be patented as lode claims, that it needs no argument to convince one of the proposition.[31]

This view was subsequently overruled in so far as it purported to limit the definition of "mineral" to

26 Commissioner's Letter, Copp's Min. Dec. 214.

27 *Ante*, § 97.

28 Webb v. American Asphaltum Co., 157 Fed. 203, 84 C. C. A. 651; Nephi Plaster Mfg. Co. v. Juab County, 33 Utah, 114, 93 Pac. 53, 54, 14 L. R. A., N. S., 1043; Utah Onyx Development Co., 38 L. D. 504; Harry Lode M. Claim, 41 L. D. 403; San Francisco Chemical Co. v. Duffield, 201 Fed. 830.

29 Wheeler v. Smith, 5 Wash. 704, 32 Pac. 784.

30 State v. Evans, 46 Wash. 219, 89 Pac. 565, 10 L. R. A., N. S., 1163.

31 Wheeler v. Smith, 23 L. D. 395, 399.

metallic substances or the "more precious metals," and the rule adopted that the term "mineral" includes all classes of deposit, whether metallic or nonmetallic.[32]

Commissioner McFarland expressed the opinion that veins of clay or nonmetalliferous substances were not subject to location as lodes, but might be entered as placers.[33]

At a time when the department entertained the view that salt deposits were subject to location under the mining laws a ruling was made to the effect that when a deposit of rock salt was found in an inclined position in the mass of the mountain in the form of a ledge, it was subject to location under the lode laws.[34]

It is unnecessary for us to here reiterate the conclusions heretofore reached by us[35] as to what is meant by the terms "mineral land" and "valuable deposits," as these terms are used in the mining laws. We think those conclusions were based upon the weight of authority. If they are correct, it follows that land containing any substance, metallic or nonmetallic, which possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, if such substance exists therein in veins or lodes *of rock in place* in sufficient quantities to render the land more valuable for the purpose of removing and marketing the product than for any

[32] Pacific Coast Marble Co. v. Northern Pacific R. R. Co., 25 L. D. 233. To same effect, Northern Pacific R. R. Co. v. Soderberg, 99 Fed. 506, 507, 104 Fed. 425, 427, 43 C. C. A. 620; S. C., 188 U. S. 526, 23 Sup. Ct. Rep. 365, 47 L. ed. 575; State v. Evans, 46 Wash. 219, 89 Pac. 565, 10 L. R. A., N. S., 1163.

[33] Montague v. Dobbs, 9 Copp's L. O. 165.

[34] In re Megarrigle, 9 Copp's L. O. 113; *post*, § 515.

[35] *Ante*, § 98.

other purpose, such land must be appropriated under the laws applicable to lodes.

This we understand to be the rule now recognized by the courts and the land department as announced in the cases heretofore cited.[36]

Article II. The Location and Its Requirements.

§ 327. "Location" and "mining claim" defined.
§ 328. Acts necessary to constitute a valid lode location under the Revised Statutes, in the absence of supplemental state legislation and local district rules.
§ 329. The requisites of a valid lode location where supplemental state legislation exists.
§ 330. Order in which acts are performed immaterial; time, when nonessential.
§ 331. Locations made by agents.
§ 332. Placer locations by power of attorney in Alaska.

§ 327. "Location" and "mining claim" defined.— "Location" and "mining claim" may not always or necessarily mean the same thing. The supreme court of the United States has said that a mining claim is a parcel of land containing precious metal in its soil or rock.[37]

A location is the act of appropriating such parcel according to certain established rules. The "location" in time became among the miners synonymous with the "mining claim" originally appropriated. If the miner has only the ground covered by one location,

[36] The rule, however, does not apply to rock salt occurring in veins. See *post*, § 513.

[37] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 648, 26 L. ed. 875. The use of the term "precious metal" in this connection is manifestly of no controlling importance. The Revised Statutes enumerate a number of metals which are in no sense "precious," and, as such statutes are interpreted, they include a great variety of substances which are not metallic.

his "mining claim" and his "location" are identical, and the two designations may be indiscriminately used to denote the same thing. But if by purchase he acquires other adjoining "locations," and adds them to his own, then the term "mining claim" is frequently used colloquially to describe the ground embraced by all the locations.[38]

Judge Hillyer defined a "mining claim" to be that portion of the public mineral lands which the miner for mining purposes takes up and holds in accordance with the mining laws.[39]

As generally or colloquially used, the term "mining claim" has no reference to the different stages in the acquisition of the government title. It may include all mines contiguous to each other and held under one ownership, whether patented or unpatented, if acquired under the mining laws,[40] or which is claimed under the mining laws, although the location may not as yet have been perfected; e. g., oil placer in process of development.[41]

Strictly speaking, "location" is the act or series of acts by which the right of exclusive possession of mineral veins and the surface of mineral lands is vested in the locators.[42]

[38] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 648, 26 L. ed. 875, 11 Morr. Min. Rep. 673; McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076. See, also, N. P. R. R. Co. v. Sanders, 49 Fed. 129, 135, 1 C. C. A. 192; In re Mackie, 5 L. D. 199.

[39] Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439, Fed. Cas. No. 9886, 9 Morr. Min. Rep. 616.

[40] Bewick v. Muir, 83 Cal. 368, 372, 23 Pac. 389, 390.

[41] Berentz v. Belmont Oil Co., 148 Cal. 577, 113 Am. St. Rep. 308, 84 Pac. 47, 48. See, also, Uinta T. M. & T. Co. v. Ajax G. M. Co., 141 Fed. 563, 73 C. C. A. 35.

[42] Creede & Cripple Creek M. & M. Co. v. Uinta M. T. Co., 196 U. S. 337, 346, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

Where these terms are used in statutes, federal or state, their true meaning is to be determined from a consideration of the entire context, which involves, of course, the general scope and character of the legislation. A few illustrations from the adjudicated cases will serve to demonstrate this.

As was said by the supreme court of the United States,—

> That which is located is called in section twenty-three hundred and twenty of the Revised Statutes and elsewhere a "claim," or "mining claim." Indeed, the words "claim" and "location" are used interchangeably.[43]

As used in section twenty-three hundred and twenty-four of the Revised Statutes, requiring a certain amount of work to be done annually upon "each claim," and in section twenty-three hundred and twenty-five prescribing the amount of labor or improvements required as a condition precedent to the issuance of a patent, the word "claim" means "location."[44]

As used in the revenue acts of the different states and territories, providing for the taxation or exemption from taxation of property, the term "mining claim" does not include patented mines.[45]

"Location" is the inception of the miner's title.

A statute of California provides that "every person who performs labor upon any 'mining claim' has a lien upon the same."[46]

[43] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 74, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[44] Opinion of Assistant Attorney-General Van Devanter, 27 L. D. 91. *Post*, §§ 628, 673.

[45] Salisbury v. Lane, 7 Idaho, 370, 63 Pac. 383; Waller v. Hughes, 2 Ariz. 114, 11 Pac. 122.

[46] Cal. Code Civ. Proc., §§ 1183, 1192.

In construing this law, the supreme court of that state has held that the lien extends to the *whole claim*,[47] but by such a "claim" was meant a portion of the public lands to which the right of enjoyment has been asserted under the mining laws; that a Mexican grant containing eleven hundred and nine acres, and another three hundred and fourteen acres, upon which mining was conducted, the whole being known as the Guadalupe mine, was not a "mining claim," and no lien could be filed thereon extending over the entire area.[48]

Nor is a tract of one hundred and sixty acres of land, held under agricultural patent, upon which parties were engaged in mining, such a "claim" as is lienable as a mining claim.[49]

But a consolidation of numerous *mining locations*, held and operated under one ownership, the aggregation being designated by a general name, such as the "Red Cloud mine," is a "mining claim," and the whole *claim* is lienable.[50]

As a mine owner may perform work on one of a group of claims and thus hold the entire group, so should a lien claimant be entitled to embrace the entire group in his lien.[51]

[47] Helm v. Chapman, 66 Cal. 291, 5 Pac. 352.

[48] Williams v. Santa Clara Min. Assn., 66 Cal. 193, 5 Pac. 85; U. S. Min. Dec. 136, 142; Week's Min. Lands, 118. As to definition under the lien laws, see Escott v. Crescent City Coal & Navigation Co., 56 Or. 190, 106 Pac. 452, 453, where all the cases are reviewed.

[49] Morse v. De Ardo, 107 Cal. 622, 40 Pac. 1018.

[50] Tredinnick v. Red Cloud M. Co., 72 Cal. 78, 84, 13 Pac. 152. See, also, Malone v. Big Flat G. M. Co., 76 Cal. 583, 18 Pac. 772; Hamilton v. Delhi M. Co., 118 Cal. 148, 50 Pac. 378; Salt Lake Hardware Co. v. Chainman M. Co., 137 Fed. 632, 642; Phillips v. Salmon River M. & D. Co., 9 Idaho, 149, 72 Pac. 886; Thompson v. Wise Boy M. & M. Co., 9 Idaho, 363, 74 Pac. 958; Idaho M. & M. Co. v. Davis, 123 Fed. 396, 399, 59 C. C. A. 200.

[51] McIntyre v. Montana Gold Mt. M. Co., 41 Mont. 87, 137 Am. St. Rep. 701, 108 Pac. 353.

While the law prescribes a limitation as to the size of a *location*, there is no limitation to the number of *claims* one person may hold by purchase.[52]

A single location is a "claim," as that term is used in the Revised Statutes. But, as we have heretofore seen, "claim" may, colloquially speaking, embrace a number of locations.

§ 328. **Acts necessary to constitute a valid lode location under the Revised Statutes, in the absence of supplemental state legislation and local district rules.** It is not necessary that any supplemental state legislation or local district regulations should exist. Where they do not exist, a location may be perfected by following the requirements of the federal law. The acts to be performed in the absence of state or district regulations are few and simple. "The intricacies are those found by the courts of the states and territories wherein mineral lands are situated arising out of complex state or territorial legislation supplementing the federal laws."[53]

The requisites of such location are:—

(1) The discovery;

(2) The marking of the location on the ground so that its boundaries can be readily traced.[54]

[52] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 648, 26 L. ed. 875, 11 Morr. Min. Rep. 673; Malone v. Big Flat G. M. Co., 76 Cal. 578, 583, 18 Pac. 772.

[53] Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1039, 19 Morr. Min. Rep. 650; Upton v. Larkin, 7 Mont. 449, 17 Pac. 728, 730, 15 Morr. Min. Rep. 404.

[54] Upton v. Larkin, 7 Mont. 449, 17 Pac. 728, 729, 15 Morr. Min. Rep. 404; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1039, 19 Morr. Min. Rep. 650; Erwin v. Perego, 93 Fed. 608, 610, 35 C. C. A. 482; Treasury Tunnel M. & R. Co. v. Boss, 32 Colo. 27, 105 Am. St. Rep. 60, 74 Pac. 888, 889; Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 969; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 216,

No notice need be posted[55] or recorded;[56] no particular kind of marking is required so long as the "boundaries may be readily traced." The taking and holding of actual possession is wholly unnecessary, and this applies to all classes of locations, wherever made, and whether state legislation or local rules exist or not, assuming, of course, that all the acts of location are complete, including discovery.[57] Actual possession is no more necessary for the protection of title acquired by a valid mining location than it is for any other grant from the United States.[58]

60 C. C. A. 155, 22 Morr. Min. Rep. 688; Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 346, 25 Sup. Ct. Rep. 266, 49 L. ed. 501; McCleary v. Broaddus, 14 Cal. App. 60, 111 Pac. 125, 126.

[55] *Post*, § 350; Perigo v. Erwin, 85 Fed. 904, 906, 19 Morr. Min. Rep. 269; Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708, 709; Gwillim v. Donnellan, 115 U. S. 45, 48, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15 Morr. Min. Rep. 482; McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 50 L. R. A. 184, 19 Morr. Min. Rep. 615; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 871, 20 Morr. Min. Rep. 103; Dwinnell v. Dyer, 145 Cal. 12, 78 Pac. 247, 253, 7 L. R. A., N. S., 763; Anderson v. Caughey, 3 Cal. App. 22, 84 Pac. 223, 224; Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 969; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 216, 60 C. C. A. 155, 22 Morr. Min. Rep. 688; McCleary v. Broaddus, 14 Cal. App. 60, 111 Pac. 125, 127.

[56] *Post*, §§ 389–392; Perigo v. Erwin, 85 Fed. 904, 906, 19 Morr. Min. Rep. 269; Magruder v. Oregon & Cal. R. R. Co., 28 L. D. 174; Dwinnell v. Dyer, 145 Cal. 12, 78 Pac. 247, 253, 7 L. R. A., N. S., 763; Anderson v. Caughey, 3 Cal. App. 22, 84 Pac. 223, 224; Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 969; Ford v. Campbell, 29 Nev. 578, 92 Pac. 206, 208; Peters v. Tonopah M. Co., 120 Fed. 587, 589; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 216, 60 C. C. A. 155, 22 Morr. Min. Rep. 688; Zerres v. Vanina, 134 Fed. 610, 617; S. C., in error, 150 Fed. 564, 80 C. C. A. 366; Sturtevant v. Vogel, 167 Fed. 448, 450, 93 C. C. A. 84; McCleary v. Broaddus, 14 Cal. App. 60, 111 Pac. 125, 127.

[57] McLemore v. Express Oil Co., 158 Cal. 559, 139 Am. St. Rep. 147, 112 Pac. 59.

[58] Belk v. Meagher, 104 U. S. 279, 283, 26 L. ed. 735, 1 Morr. Min. Rep. 510; Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708, 709; Gwillim v. Donnellan, 115 U. S. 45, 48, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15

Such a discovery having been made as will satisfy the law,[59] the marking of the location on the ground including the place of his discovery completes the location and clothes the locator with the complete possessory title. No development or discovery work is required. In fact, no labor need be performed nor improvements made until within the year commencing on the first day of January succeeding the date of the location.[60]

§ 329. The requisites of a valid lode location under the Revised Statutes where supplemental state legislation exists.—Practically all of the precious metal-bearing states have availed themselves of the privilege of supplementing federal legislation, and have adopted systems more or less comprehensive. We have heretofore given an outline of the general scope and character of this legislation,[61] from which it will be readily observed that in some of the states certain requirements exist which are not found in others. Where state laws or local regulations exist which are not repugnant to the federal statutes, compliance with such supplemental law is requisite to the validity of a location.[62]

Morr. Min. Rep. 482; McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 50 L. R. A. 184, 19 Morr. Min. Rep. 615; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 872, 20 Morr. Min. Rep. 103; Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600, 602; Holdt v. Hazard, 10 Cal. App. 440, 102 Pac. 540; McCulloch v. Murphy, 125 Fed. 147, 150.

[59] *Post*, § 336.

[60] Amend. to § 2324, Rev. Stats., Jan. 22, 1880, 21 Stats. at Large, 61; Comp. Stats. 1901, p. 1426; 5 Fed. Stats. Ann. 19. An exception to this rule is found in the territory of Alaska, where by act of congress passed August 24, 1912, the first year's work must be performed during the calendar year in which the location is made. *Post*, § 332.

[61] *Ante*, §§ 248–252.

[62] Butte City Water Co. v. Baker, 196 U. S. 119, 121, 25 Sup. Ct. Rep. 211, 49 L. ed. 409; affirming Baker v. Butte City Water Co., 28

As state laws form an important element of the federal system in their respective jurisdictions, it is necessary to a satisfactory presentation of the subject under consideration to give them their proper place, distributed under the several appropriate heads. We think the object may be intelligently accomplished by selecting as a type of such state legislation the local code which is the most comprehensive, and note the differences between that code and the existing laws of other states and territories. In this way we shall be enabled to present, under appropriate subdivisions approaching methodical arrangement, the rule in each state or territory touching the subject immediately under consideration, in connection with the treatment of the requirements of the congressional laws. For this purpose we select the state of Colorado, and will divide our subject, for purpose of treatment, on the basis of the Colorado mining laws, noting wherein the requirements of other states are similar or are different.

Under the laws of Colorado the following acts are required to complete a valid lode location:—

(1) The discovery;

(2) The sinking of a discovery shaft of certain prescribed dimensions, or its equivalent;

(3) The posting of a notice;

(4) The marking of surface boundaries in a certain specified manner;

Mont. 222, 104 Am. St. Rep. 683, 72 Pac. 617; Hahn v. James, 29 Mont. 1, 73 Pac. 965, 966; Wright v. Lyons, 45 Or. 167, 77 Pac. 81; Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 222, 7 L. R. A., N. S., 791; Purdum v. Ladin, 23 Mont. 387, 59 Pac. 153, 154; Belk v. Meagher, 104 Fed. 284, 26 L. ed. 735, 1 Morr. Min. Rep. 510; Garfield M. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153, 155.

(5) The making of a location certificate;

(6) The recording of such certificate.[63]

A substantial compliance with the requirements of the laws, federal and state, as well as local rules, where they exist and are not repugnant to state or federal legislation, is a condition precedent to the completion of a valid location.[64]

In some states this rule is somewhat modified as to certain of the acts in the series. For example, in Nevada it has been held that a failure to record a location notice does not invalidate the location.[65]

[63] Strepey v. Stark, 7 Colo. 614, 5 Pac. 111, 17 Morr. Min. Rep. 28. For a statement of Colorado requirements, see Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 347, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

[64] Belk v. Meagher, 104 U. S. 279, 284, 26 L. ed. 735, 1 Morr. Min. Rep. 510; Upton v. Larkin, 5 Mont. 600, 6 Pac. 66, 68; Garfield M. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153, 155; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111, 114, 17 Morr. Min. Rep. 28; McKinstry v. Clark, 4 Mont. 370, 395, 1 Pac. 759, 762; Noyes v. Black, 4 Mont. 527, 2 Pac. 769; Gleeson v. Martin White M. Co., 13 Nev. 443; Sweet v. Webber, 7 Colo. 443, 4 Pac. 752, 754; Lalande v. McDonald, 2 Idaho, 283 (307), 13 Pac. 347, 349; Lockhart v. Wills, 9 N. M. 344, 54 Pac. 336, 339, 19 Morr. Min. Rep. 497; Kendall v. San Juan M. Co., 144 U. S. 658, 664, 12 Sup. Ct. Rep. 779, 36 L. ed. 583, 17 Morr. Min. Rep. 475; Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 678, 20 Morr. Min. Rep. 283; Copper Globe M. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019, 1021, 21 Morr. Min. Rep. 296; Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153, 154; Baker v. Butte City Water Co., 28 Mont. 222, 104 Am. St. Rep. 683, 72 Pac. 617, 618; affirmed, 196 U. S. 119, 121, 25 Sup. Ct. Rep. 211, 49 L. ed. 409; Hahn v. James, 29 Mont. 1, 73 Pac. 965, 966; Mares v. Dillon, 30 Mont. 117, 75 Pac. 963, 964; Dolan v. Passmore, 34 Mont. 277, 85 Pac. 1034, 1035; Helena Gold & Iron Co. v. Baggeley, 34 Mont. 464, 87 Pac. 455, 459; Butte Northern Copper Co. v. Radmilovich, 39 Mont. 157, 101 Pac. 1078, 1079; Ferres v. McNally (Mont.), 121 Pac. 889, 892.

[65] Ford v. Campbell, 29 Nev. 578, 92 Pac. 206, 208; Zerres v. Vanina, 134 Fed. 610, 618; Warles v. Davies, 158 Fed. 667, 668; S. C., on appeal, 164 Fed. 397, 90 C. C. A. 385.

The relaxation of the general rule, as above stated, however, is comparatively rare, and the requirements of the state laws are usually held to be mandatory.

Mere possession without complying with the law confers no rights.[66]

For the purpose of applying the doctrine of relation after patent issues, the date of performing the last act in the series of acts required to be performed is the date to which the patent relates.[67]

In the nature of things, we cannot deal with local district regulations in detail. We have heretofore outlined our views as to their legitimate scope and the extent to which they may be operative.[68] Where they exist and are in harmony with state and federal legislation, they are to be considered and construed in the light of the general principles, which will be enunciated in reference to state legislation in the succeeding articles.

§ 330. Order in which acts are performed immaterial—Time, when nonessential.—Generally speaking, under the laws of congress as well as under state laws and local rules the natural and proper order of procedure to complete a location are (1) discovery, (2)

[66] *Ante*, §§ 216–219; Horswell v. Ruiz, 67 Cal. 111, 7 Pac. 197, 15 Morr. Min. Rep. 488; Morenhaut v. Wilson, 52 Cal. 263; Chapman v. Toy Long, 4 Saw. 28, Fed. Cas. No. 2610, 1 Morr. Min. Rep. 497; Belk v. Meagher, 104 U. S. 279, 284, 26 L. ed. 735, 1 Morr. Min. Rep. 510; Jordan v. Duke, 4 Ariz. 278, 36 Pac. 896, 897; Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 346, 25 Sup. Ct. Rep. 266, 49 L. ed. 501. A possible exception to this rule is found in the decisions of the California courts discussed in a previous section (§ 218), protecting possession of oil locators while they are actually engaged in boring for oil prior to discovery.

[67] Hickey v. Anaconda Copper M. Co., 33 Mont. 46, 81 Pac. 806, 811. As to doctrine of relation generally, see *post*, § 783.

[68] *Ante*, §§ 268–275.

posting notice, (3) recording notice, (4) marking boundaries, (5) development work;[69] but the order in which the several acts required by law are to be performed is nonessential, in the absence of intervening rights.[70]

The marking of the boundaries may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator.[71]

[69] Dwinnell v. Dyer, 145 Cal. 12, 21, 78 Pac. 247, 253, 7 L. R. A., N. S., 763.

[70] Golden Terra v. Mahler, 4 Morr. Min. Rep. 390, 4 Pac. C. L. J. 405; Thompson v. Spray, 72 Cal. 528, 14 Pac. 182, 185; Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. 401, 404, 15 Morr. Min. Rep. 602; Perigo v. Erwin, 85 Fed. 904, 905, 19 Morr. Min. Rep. 269; Erwin v. Perigo, 93 Fed. 608, 610, 35 C. C. A. 482; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. 666, 676, 7 Saw. 96, 4 Morr. Min. Rep. 411; North Noonday M. Co. v. Orient M. Co., 1 Fed. 522, 531, 6 Saw. 299, 9 Morr. Min. Rep. 529; Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & M. Co., 196 U. S. 337, 348, 25 Sup. Ct. Rep. 266, 49 L. ed. 501; Dwinnell v. Dyer, 145 Cal. 12, 21, 78 Pac. 247, 253, 7 L. R. A., N. S., 763; Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931, 932; McCleary v. Broaddus, 14 Cal. App. 60, 111 Pac. 125, 126; La Grande Investment Co. v. Shaw, 44 Or. 416, 72 Pac. 795, 796, 74 Pac. 919; Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 1084, 74 Pac. 444; S. C., in error, 197 U. S. 313, 25 Sup. Ct. Rep. 468, 49 L. ed. 770; Treasury Tunnel M. & R. Co. v. Boss, 32 Colo. 27, 105 Am. St. Rep. 60, 74 Pac. 888, 890; Weed v. Snook, 144 Cal. 439, 77 Pac. 1023, 1025; Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 223, 7 L. R. A., N. S., 791; New England & Coalinga Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180, 181; Merced Oil Co. v. Patterson, 153 Cal. 624, 96 Pac. 90; Ford v. Campbell, 29 Nev. 578, 92 Pac. 206; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 217, 60 C. C. A. 155, 22 Morr. Min. Rep. 688; Dean v. Omaha-Wyoming Oil Co. (Wyo.), 128 Pac. 881, 883.

[71] Erwin v. Perigo, 93 Fed. 608, 610, 35 C. C. A. 482; Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 14, 50 C. C. A. 79, 21 Morr. Min. Rep. 633; Reins v. Raunheim, 28 L. D. 526; Olive Land & D. Co. v. Olmstead, 103 Fed. 568, 578, 20 Morr. Min. Rep. 700; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 952, 20 Morr. Min. Rep. 591; Brewster v. Shoemaker, 28 Colo. 176, 89 Am. St. Rep. 188, 63 Pac.

But if the boundaries are marked before discovery, the location will date from the time discovery is made.[72]

The supreme court of Colorado has thus expressed the rule: —

> The validity of the location of a mining claim is made to depend primarily upon the discovery of a vein or lode within its limits. Section 2320, Rev. Stats., U. S. Until such discovery, no rights are acquired by location. The other requisites which

309, 310, 53 L. R. A. 793, 21 Morr. Min. Rep. 155; Cedar Canyon Cons. M. Co. v. Yarwood, 27 Wash. 271, 91 Am. St. Rep. 841, 67 Pac. 749, 752, 22 Morr. Min. Rep. 11; Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 1084, 74 Pac. 444; Treasury Tunnel M. & R. Co. v. Boss, 32 Colo. 27, 105 Am. St. Rep. 60, 74 Pac. 888, 890; Field v. Tanner, 32 Colo. 278, 75 Pac. 916, 917; Dwinnell v. Dyer, 145 Cal. 12, 78 Pac. 247, 253, 7 L. R. A., N. S., 763; Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 223, 7 L. R. A., N. S., 791; Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015, 1016; Butte Consol. M. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 304, 90 Pac. 177; Whiting v. Straup, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849, 854; Phillips v. Brill, 17 Wyo. 26, 95 Pac. 856, 858; Merced Oil Co. v. Patterson, 153 Cal. 624, 96 Pac. 90, 91; S. C., second appeal (Cal., March 22, 1912), 122 Pac. 950, 952.

[72] Text quoted with approval in Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & M. Co., 196 U. S. 334, 348, 25 Sup. Ct. Rep. 266, 49 L. ed. 501, and is further supported by the following cases: Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 952, 20 Morr. Min. Rep. 591; Brewster v. Shoemaker, 28 Colo. 176, 89 Am. St. Rep. 188, 63 Pac. 309, 310, 53 L. R. A. 793, 21 Morr. Min. Rep. 155; Tuolumne G. M. Co. v. Maier, 134 Cal. 583, 66 Pac. 863, 21 Morr. Min. Rep. 678; Erwin v. Perigo, 93 Fed. 608, 610, 35 C. C. A. 482; Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 14, 50 C. C. A. 79, 21 Morr. Min. Rep. 633; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. 666, 676, 7 Saw. 96, 4 Morr. Min. Rep. 411; Reins v. Raunheim, 28 L. D. 526; North Noonday M. Co. v. Orient M. Co., 1 Fed. 522, 531, 6 Saw. 299, 9 Morr. Min. Rep. 529; Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 677, 20 Morr. Min. Rep. 283; Johanson v. White, 160 Fed. 901, 903; Waskey v. Hammer, 170 Fed. 31, 35, 95 C. C. A. 305; affirmed, 223 U. S. 85, 32 Sup. Ct. Rep. 187, 56 L. ed. 359; Hall v. McKinnon, 193 Fed. 572, 577; Hanson v. Craig, 170 Fed. 62, 64, 95 C. C. A. 338.

must be observed in order to perfect and keep alive a valid location are not imperative, except as against the rights of third persons. If the necessary steps outside of discovery are not taken within the time required by law, but are complied with before the rights of third parties intervene, they relate back to the date of location. But not so with discovery, for it is upon that act that the very life of a mineral location depends; and from the time of such discovery only would the location be valid, provided, of course, that others had not acquired rights therein.[73]

The case of Erwin v. Perigo[74] involved a mining claim on which a discovery was not made until after the marking of the boundaries. The court said:—

The marking of the boundaries of the claim may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator as of the date of the later, and a complete possessory title to the premises will vest in him as of the later date.

This language is undoubtedly correct as applied to the facts under discussion by the court. But it may be questioned whether the statement is correct as applied to a case where the marking occurs subsequent to the discovery. In such a case we think, in the absence of a state statute fixing a definite time, a discoverer of mineral has a reasonable time within which to mark his boundaries,[75] and if he complete the marking within a reasonable time, his title will date from the time of discovery. It has frequently been held that discovery is the source of a miner's title.[76]

[73] Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 498, 952, 20 Morr. Min. Rep. 591; Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015, 1016.

[74] 93 Fed. 608, 611, 35 C. C. A. 482.

[75] *Post*, § 339.

[76] *Post*, § 335. Where the doctrine of relation is invoked after patent issues, the supreme court of Montana holds that the time to which the

The failure to perform any of the given acts within the time limited by the laws or local rules may subject the ground to relocation; but if the requirements are complied with prior to the acquisition of any intervening rights, no one has a right to complain. Of course, the locator delays at his peril;[77] but if the appropriation becomes complete before anyone else initiates a right, the antecedent delay is condoned, and the right becomes perfected.[78] But unless completed within the time prescribed, the attempted location is of no avail as against intervening rights,[79] assuming, of course, that

patent relates is the date of the performance of the last act in the series required under the state laws to perfect a location, i. e., the filing of the certificate for record. Hickey v. Anaconda Copper M. Co., 33 Mont. 46, 81 Pac. 806, 811. Brantly, C. J., concurring, thinks the title should relate to the date of discovery. A full discussion of the doctrine of relation will be found *post*, in § 783.

77 Protective M. Co. v. Forest City M. Co., 51 Wash. 643, 99 Pac. 1033, 1034.

78 McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652, 655, 15 Morr. Min. Rep. 329; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 314, 1 Fed. 522, 531, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 115, 11 Fed. 666, 676, 4 Morr. Min. Rep. 411; Omar v. Soper, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443, 447, 15 Morr. Min. Rep. 496; McEvoy v. Hyman, 25 Fed. 596, 597, 15 Morr. Min. Rep. 397; Preston v. Hunter, 67 Fed. 996, 999, 15 C. C. A. 148; Faxon v. Barnard, 4 Fed. 702, 703, 2 McCrary, 44, 9 Morr. Min. Rep. 515; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111, 114, 17 Morr. Min. Rep. 28; Craig v. Thompson, 10 Colo. 517, 16 Pac. 24; Lockhart v. Willis, 9 N. M. 344, 54 Pac. 336, 341, 19 Morr. Min. Rep. 497; Crown Point G. M. Co. v. Crismon, 39 Or. 364, 65 Pac. 87, 88, 21 Morr. Min. Rep. 406; La Grande Investment Co. v. Shaw, 44 Or. 416, 72 Pac. 795, 796, 74 Pac. 919; Dwinnell v. Dyer, 145 Cal. 12, 78 Pac. 247, 250, 7 L. R. A., N. S., 763; Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931, 932; Brockbank v. Albion M. Co., 29 Utah, 367, 81 Pac. 863.

79 Pelican & Dives M. Co. v. Snodgrass, 9 Colo. 339, 12 Pac. 206, 208; Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. 714, 715; Upton v. Larkin, 5 Mont. 600, 6 Pac. 66, 67; Copper Globe M. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019, 1022, 21 Morr. Min. Rep. 296.

the subsequent entry for the purpose of location is peaceable and in good faith.[80]

§ 331. Locations made by agents.—With the exception of placer claims in the territory of Alaska, with reference to which recent legislation restricts locations by agents and attorneys in fact, which legislation is referred to in the succeeding section, there is nothing in the laws of congress that prohibits one from initiating a location of a mining claim by an agent.[81]

All the acts of location required to be performed, including discovery, may be done by any agent or employee of the locator, or by any person in his behalf and for his benefit.[82]

As the title comes from the appropriation made in accordance with the law, and as it is not necessary that a party should personally act in taking up a claim, or in doing the acts required to give evidence of the appropriation, or to perfect the appropriation, it would seem, at least in the absence of a local rule or statute to the contrary, that such acts are valid if done by one for another, or with his assent.[83]

A location may be made without the knowledge of the principal, if there is a local rule authorizing it; otherwise, there may be antecedent authority or subsequent ratification.[84]

[80] *Ante*, § 219. See Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 1084, 74 Pac. 444, and Weed v. Snook, 144 Cal. 439, 77 Pac. 1023, 1025, where the supreme court of California protects a locator without discovery while in actual possession and boring for oil.

[81] Schultz v. Keeler, 2 Idaho, 305 (333), 13 Pac. 481, 482.

[82] Charge to jury in Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 217, 60 C. C. A. 155, 22 Morr. Min. Rep. 688; McCulloch v. Murphy, 125 Fed. 147, 149.

[83] Gore v. McBrayer, 18 Cal. 582, 587.

[84] Thompson v. Spray, 72 Cal. 528, 14 Pac. 182, 184; Murley v. Ennis, 2 Colo. 300; Morton v. Solambo C. M. Co., 26 Cal. 527, 534; Hirbour v.

Such authority need not be in writing.[85]

A party in whose name a mining claim is located is presumed to have assented to the location,[86] upon the principle that a party is presumed to assent to a deed or other act manifestly for his benefit.[87]

One of several colocators of a mining claim may cause a notice of a mining claim to be recorded in the name of himself and others not present, and the location will be valid,[88] provided, of course, that the names of the absentees are used in good faith and not as "dummies."[89]

When a location is made by one in the name of others, the persons in whose names it is made become vested with the legal title to the claim.[90] The estate so acquired cannot be divested by making a second location leaving out the names of the original locators, so

Reeding, 3 Mont. 15; Welland v. Huber, 8 Nev. 203; Moritz v. Lavelle, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803, 804, 16 Morr. Min. Rep. 236; Book v. Justice M. Co., 58 Fed. 106, 118, 17 Morr. Min. Rep. 617; Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943, 945, 19 Morr. Min. Rep. 556; Morrison v. Regan, 8 Idaho, 291, 67 Pac. 956, 22 Morr. Min. Rep. 69; Whiting v. Straup, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849.

85 Morrison v. Regan, 8 Idaho, 291, 67 Pac. 956, 960, 22 Morr. Min. Rep. 69; Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943, 946, 19 Morr. Min. Rep. 556; Moritz v. Lavelle, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803, 804, 16 Morr. Min. Rep. 236; Book v. Justice M. Co., 58 Fed. 106, 119, 17 Morr. Min. Rep. 617; Moore v. Hamerstag, 109 Cal. 122, 41 Pac. 805, 806, 18 Morr. Min. Rep. 256.

86 Kramer v. Settle, 1 Idaho, 485; Van Valkenburg v. Huff, 1 Nev. 142, 149; Rush v. French, 1 Ariz. 99, 25 Pac. 816, 829.

87 Gore v. McBrayer, 18 Cal. 582, 588.

88 Kramer v. Settle, 1 Idaho, 485; Dunlap v. Pattison, 4 Idaho, 473, 95 Am. St. Rep. 140, 42 Pac. 504, 505.

89 *Post*, § 450.

90 Van Valkenburg v. Huff, 1 Nev. 142, 149; Moore v. Hamerstag, 109 Cal. 122, 41 Pac. 805, 806, 18 Morr. Min. Rep. 256; Whiting v. Straup, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849, 851.

long as the first location remains valid and subsisting.[91] If, however, they have abandoned or forfeited their rights by failure to comply with the conditions of the agreement under which the location was originally made, a relocation may be made by the original colocator or agent in his own name.[92]

Where the location becomes subject to relocation by reason of the failure of the colocators to perform the annual labor required by law a different question arises —a subject fully discussed in subsequent sections.[93]

If an agent makes a location on behalf of his principal, but, pursuant to a conspiracy with others, permits the location to lapse, in order that a relocation may be made in his own and others' behalf, the remedy of the principal after such relocation would be an action for breach of contract or to establish and enforce a trust in the claim as relocated against the parties relocating.[94]

§ 332. Placer locations by attorney in fact in Alaska.—Congress on August 1, 1912, passed an act entitled "An act to modify and amend the mining laws in their application to the territory of Alaska," which provides as follows:—

> That no association placer-mining claim shall hereafter be located in Alaska in excess of forty

[91] Van Valkenburg v. Huff, 1 Nev. 142, 149; Thompson v. Spray, 72 Cal. 528, 14 Pac. 182, 184; Gore v. McBrayer, 18 Cal. 582, 587; Morton v. Solambo C. M. Co., 26 Cal. 527, 534; Perelli v. Candiani, 42 Or. 625, 71 Pac. 537; Stevens v. Grand Central M. Co., 133 Fed. 28, 30, 67 C. C. A. 284; In re Auerbach, 29 L. D. 208; In re Teller, 26 L. D. 484. For a case stated upon which the courts held a trust *ex maleficio* to arise, see Lockhart v. Leeds, 195 U. S. 427, 435, 25 Sup. Ct. Rep. 76, 49 L. ed. 263.

[92] Murley v. Ennis, 2 Colo. 300.

[93] *Post*, §§ 405, 406.

[94] Lockhart v. Johnson, 181 U. S. 516, 529, 21 Sup. Ct. Rep. 665, 45 L. ed. 979; Lockhart v. Leeds, 195 U. S. 427, 438, 25 Sup. Ct. Rep. 76, 49 L. ed. 263.

acres, and on every placer-mining claim hereafter located in Alaska, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, including the year of location, for each and every twenty acres or excess fraction thereof.

Sec. 2. That no person shall hereafter locate any placer-mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer-mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer-mining claims for any one principal or association during any calendar month, and no placer-mining claim shall hereafter be located in Alaska except under the limitations of this act.

Sec. 3. That no person shall hereafter locate, cause or procure to be located for himself more than two placer-mining claims in any calendar month: *Provided*, That one or both of such locations may be included in an association claim.

Sec. 4. That any placer-mining claim attempted to be located in violation of this act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made.

It will be observed that the general placer laws are thus modified in their application to Alaska in the following respects:

(1) An association of persons cannot locate to exceed forty acres, instead of one hundred and sixty, allowed under the general law.[95]

[95] Rev. Stats., § 2330; Comp. Stats. 1901, p. 1432; 5 Fed. Stats. Ann. 42; *post*, § 448.

(2) Annual work must be done on each location the same as elsewhere, with the added requirement that it must be done during the year in which the location is made. Association claims require one hundred dollars' worth of work for each twenty acres or fraction thereof. Under the general law annual work to the extent of one hundred dollars is required to be done on each *location* regardless of its area.[96]

(3) There can be no location of placer ground by an agent unless he is given a written power of attorney which must be recorded in the recorder's office in the judicial division where the location is made.

(4) By implication it permits locations to be made without regard to the system of public land surveys, i. e., rectangular lines, corresponding to the cardinal points. This, however, has been the practice heretofore.

(5) The number of locations which an individual may make for himself is limited to two in each calendar month. Under the general laws the number is unlimited.[97]

(6) An individual may only act under power of attorney from two individuals or one association and may only locate two claims in his representative capacity during each calendar month.

The act deals only with placer-mining claims.[97a] The general principles announced in the preceding section are still applicable to lode claims in Alaska.

[96] *Post*, § 628.

[97] *Post*, § 450.

[97a] For departmental instructions on the subject of location of placer claims by agent in Alaska, see 41 L. D. 347.

Article III. The Discovery.

§ 335. Discovery the source of the miner's title.
§ 336. What constitutes a valid discovery.
§ 337. Where such discovery must be made.
§ 338. The effect of the loss of discovery upon the remainder of the location.
§ 339. Extent of locator's rights after discovery and prior to completion of location.

§ 335. Discovery the source of the miner's title.—Discovery in all ages and all countries has been regarded as conferring rights or claims to reward. Gamboa, who represented the general thought of his age on this subject, was of the opinion that the discoverer of mines was even more worthy of reward than the inventor of a useful art. Hence, in the mining laws of all civilized countries the great consideration for granting mines to individuals is *discovery*. "Rewards so bestowed," says Gamboa, "besides being a proper return for the labor and anxiety of the discoverers, have the further effect of stimulating others to search for veins and mines, on which the general prosperity of the state depends."[98]

While in some of the older countries of Europe, as in France and Belgium, the nature of the reward to the discoverer was something less than an absolute preference in the right of enjoyment, yet in Spain and Spanish-America there was guaranteed to him "an absolute right of property in the mine which he discovers if he will take the proper measures to denounce

[98] Halleck's De Fooz on the Law of Mines, p. xxvi. Text quoted in Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 343, 25 Sup. Ct. Rep. 266, 49 L. ed. 501; Lawson v. United States Mining Co., 207 U. S. 1, 13, 28 Sup. Ct. Rep. 15, 52 L. ed. 65; Rapp v. Heirs of Healey, 38 L. D. 387.

it and have it duly registered. No one can have any preference over him, and he loses the rights which result from his discovery only through his own neglect to make it publicly known in the manner in which the law directs."[99]

This wise and liberal policy which pervaded the Mexican system at the time of the conquest and the acquisition of California by the United States became the recognized basis of mining rights and privileges as they were held and enjoyed under the local rules and regulations established by the miners occupying the public mineral lands within the newly acquired territory, and in all subsequent legislation, whether congressional, state, or territorial, discovery is recognized as the primary source of title to mining claims.[100]

As was said by Halleck in his introduction to De Fooz on the "Law of Mines,"[1] "*Discovery* is made the source of title, and *development*, or working, the condition of the continuance of that act."

Whatever may be the rule governing the acquisition of title to "claims usually called placers, including all forms of deposit, excepting veins of quartz or other rock in place," of which we treat in a subsequent chapter, there can be no valid appropriation of a lode claim unless there has been an antecedent discovery. "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."[2]

[99] Halleck's De Fooz on the Law of Mines, p. xxvii.

[100] Erhardt v. Boaro, 113 U. S. 527, 535, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472.

[1] San Francisco, 1860.

[2] Rev. Stats., § 2320; Comp. Stats. 1901, p. 1432; 5 Fed. Stats. Ann. 8; Chrisman v. Miller, 197 U. S. 313, 321, 25 Sup. Ct. Rep. 468, 49 L. ed. 770; Garabaldi v. Grillo, 17 Cal. App. 540, 120 Pac. 425, 426.

But this provision of the statute does not require that the locator of the claim must be the original discoverer of the vein or lode. If there has been a discovery by some one other than the locator, and the latter has knowledge of the existence of mineral and adopts the former discovery, he is entitled to make a location.[3]

A location can rest only upon an actual discovery of the vein or lode.[4]

Discovery of mineral is the initial fact. Without that no rights can be acquired.[5] In litigation arising out of conflicting locations parties may stipulate that the lands are mineral lands, but this does not dispense with proof of discovery.[6] Such discovery must precede the location,[7] or be in advance of intervening

[3] Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. 1029, 1031, 19 Morr. Min. Rep. 485; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. 666, 676, 7 Saw. 96, 4 Morr. Min. Rep. 411. See Erhardt v. Boaro, 113 U. S. 527, 536, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472; Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 678, 40 Morr. Min. Rep. 283; Copper Globe Cons. M. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019, 1022, 21 Morr. Min. Rep. 296. See *post*, § 403.

[4] King v. Amy & Silversmith M. Co., 152 U. S. 222, 226, 14 Sup. Ct. Rep. 510, 38 L. ed. 419, 18 Morr. Min. Rep. 76; Tuolumne Cons. M. Co. v. Maier, 134 Cal. 583, 66 Pac. 863, 864, 21 Morr. Min. Rep. 678.

[5] Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 334, 345, 25 Sup. Ct. Rep. 266, 49 L. ed. 501; Garabaldi v. Grillo, 17 Cal. App. 540, 120 Pac. 425, 426; Hall v. McKinnon, 193 Fed. 572, 577.

[6] Garabaldi v. Grillo, 17 Cal. App. 540, 120 Pac. 425, 426.

[7] Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. 714, 715; Upton v. Larkin, 7 Mont. 449, 17 Pac. 728, 731, 15 Morr. Min. Rep. 404; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 309, 1 Fed. 522, 530, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 109, 11 Fed. 666, 675, 4 Morr. Min. Rep. 411; Burke v. McDonald, 2 Idaho, 646 (679), 33 Pac. 49, 50, 7 Morr. Min. Rep. 325; Stinchfield v. Gillis, 96 Cal. 33, 30 Pac. 839, 841, 17 Morr. Min. Rep. 497; McLaughlin v. Thompson, 2 Colo. App. 135, 29 Pac. 816; Waterloo M. Co. v. Doe, 56 Fed. 685, 689, 17 Morr. Min. Rep. 586; Etling v. Potter, 17 L. D. 424; N. P. R. R. Co.

rights.[8] The proof of recording and marking a claim will not authorize the court to presume a discovery.[9]

If no discovery is made until after the acts of location have been performed, the location will date from the time of discovery.[10]

v. Marshall, 17 L. D. 545; Ledoux v. Forester, 94 Fed. 600, 602; Tuolumne Cons. M. Co. v. Maier, 134 Cal. 583, 66 Pac. 863, 864, 21 Morr. Min. Rep. 678; Gemmell v. Swain, 28 Mont. 331, 98 Am. St. Rep. 570, 72 Pac. 662, 663, 22 Morr. Min. Rep. 716; Garabaldi v. Grillo, 17 Cal. App. 540, 120 Pac. 425, 426.

[8] Patchen v. Keeley, 19 Nev. 404, 14 Pac. 347, 353; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 309, 1 Fed. 522, 530, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 109, 11 Fed. 666, 676, 4 Morr. Min. Rep. 411; Golden Terra M. Co. v. Mahler, 4 Morr. Min. Rep. 390, 4 Pac. C. L. J. 405; Wight v. Taber, 2 L. D. 738, 743; In re Mitchell, 2 L. D. 752; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 952, 20 Morr. Min. Rep. 591; Brewster v. Shoemaker, 28 Colo. 176, 89 Am. St. Rep. 188, 63 Pac. 309, 310, 53 L. R. A. 793, 21 Morr. Min. Rep. 155; Fisher v. Seymour, 23 Colo. 542, 49 Pac. 30, 33; Perigo v. Erwin, 85 Fed. 904, 905, 19 Morr. Min. Rep. 269; Erwin v. Perigo, 93 Fed. 608, 611, 35 C. C. A. 482; Reins v. Raunheim, 28 L. D. 526; Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 680, 20 Morr. Min. Rep. 283; Olive Land & D. Co. v. Olmstead, 103 Fed. 568, 573, 20 Morr. Min. Rep. 700; Sands v. Cruikshank, 15 S. D. 142, 87 N. W. 589; Cedar Canyon Cons. M. Co. v. Yarwood, 27 Wash. 271, 91 Am. St. Rep. 841, 67 Pac. 749, 752, 22 Morr. Min. Rep. 11; Bay v. Oklahoma Southern Gas & O. Co., 13 Okl. 425, 73 Pac. 936, 939; Dean v. Omaha-Wyoming Oil Co. (Wyo.), 128 Pac. 881, 883.

[9] Smith v. Newell, 86 Fed. 56.

[10] *Ante*, § 330; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 952, 20 Morr. Min. Rep. 591; Tuolumne M. Co. v. Maier, 134 Cal. 583, 66 Pac. 863, 864, 21 Morr. Min. Rep. 678; Brewster v. Shoemaker, 28 Colo. 176, 63 Pac. 309, 310, 21 Morr. Min. Rep. 155; Erwin v. Perigo, 93 Fed. 608, 611, 35 C. C. A. 482; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. 666, 676, 7 Saw. 96, 4 Morr. Min. Rep. 411; North Noonday M. Co. v. Orient M. Co., 1 Fed. 522, 531, 6 Saw. 299, 309, 9 Morr. Min. Rep. 529; Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 677, 20 Morr. Min. Rep. 283; Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & M. Co., 196 U. S. 337, 345, 25 Sup. Ct. Rep. 266, 49 L. ed. 501; Protective Mining Co. v. Forest City M. Co., 51 Wash. 643, 99 Pac. 1033, 1034.

Priority of discovery gives priority of right against naked location and possession, without discovery.[11]

It has been said that this requirement as to antecedent discovery is made for the benefit of the United States, so that land cannot be acquired under this law until its character is first ascertained to be mineral.[12]

It will be necessary for us to determine:—

(1) What constitutes a valid discovery;

(2) Where such discovery must be made;

(3) The effect of the loss of discovery upon the remainder of the location;

(4) The extent of a locator's rights after discovery and prior to completion of location.

§ 336. **What constitutes a valid discovery.**—In determining what constitutes such a discovery as will satisfy the law and form the basis of a valid mining location, we find, as in the case of the definition of the terms "lode" or "vein," that the tendency of the courts is toward marked liberality of construction where a question arises between two miners who have located claims upon the same lode, or within the same surface boundaries, and toward strict rules of interpretation when the miner asserts rights in property which either *prima facie* belongs to some one else or is claimed under laws other than those providing for the disposition of mineral lands, in which latter case the *relative* value of the tract is a matter directly in issue.

[11] Crossman v. Pendery, 8 Fed. 693, 2 McCrary, 139, 4 Morr. Min. Rep. 431; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 952, 20 Morr. Min. Rep. 591.

[12] Upton v. Larkin, 7 Mont. 449, 17 Pac. 728, 15 Morr. Min. Rep. 404; Shoshone M. Co. v. Rutter, 87 Fed. 801, 808, 31 C. C. A. 223, 19 Morr. Min. Rep. 356; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1040, 19 Morr. Min. Rep. 650.

The reason for this is obvious. In the case where two miners assert rights based upon separate alleged discoveries on the same vein, neither is hampered with presumptions arising from a prior grant of the tract, to overcome which strict proof is required.[13] In applying a liberal rule to one class of cases and a rigid rule to another, the courts justify their action upon the theory that the object of each section of the Revised Statutes, and the whole policy of the entire law, should not be overlooked.[14]

The particular character of each case must be kept continually in view.

> The fact is, that there is a substantial difference in the object and policy of the law between the cases where the determination of the question as to what constitutes the discovery of a vein, or lode, between different claimants of the same lode under section twenty-three hundred and twenty of the Revised Statutes, on the one hand, and a "lode known to exist" within the limits of a placer claim at the time the application is made for a patent therefor under section twenty-three hundred and thirty-three, on the other.[15]

In the first class of cases, it was never intended to "weigh scales" to determine the value of the mineral

[13] Ordinarily, the controversy in this class of cases is confined to questions of mere priority. Steele v. Tanana Mines R. Co., 148 Fed. 678, 680, 78 C. C. A. 412; Lange v. Robinson, 148 Fed. 799, 803, 79 C. C. A. 1.

[14] Text quoted with approval, Grand Central M. Co. v. Mammoth M. Co., 29 Utah, 490, 83 Pac. 648, 677; appeal dismissed, 213 U. S. 72, 29 Sup. Ct. Rep. 413, 53 L. ed. 702; Steele v. Tanana Mines R. Co., 148 Fed. 678, 680, 78 C. C. A. 412.

[15] Migeon v. Mont. Cent. Ry., 77 Fed. 249, 255, 23 C. C. A. 156, 18 Morr. Min. Rep. 446. See, also, Bonner v. Meikle, 82 Fed. 697, 703, 19 Morr. Min. Rep. 83; Ambergris Min. Co. v. Day, 12 Idaho, 108, 85 Pac. 109, 113; Fox v. Myers, 29 Nev. 169, 86 Pac. 793, 797.

found.[16] In the latter class, the rule is different. Slight evidence of the existence of a lode might satisfy the demands of the law upon the question of discovery as the basis of location, when clear and convincing proof would be required to establish the existence of a "known vein" within a prior townsite or placer patent.

The supreme court of the United States clearly recognizes the distinction between the two classes of cases, by intimating that the land officers might, on a *prima facie* case, decide the right of an applicant to a vein or lode and issue a patent therefor, upon proof less conclusive than would be required where a conflict arises between a prior placer and subsequent lode patent.[17]

Even in the same line of cases, that court at one time approved a liberal definition of a lode "known to exist" within a placer;[18] and at another insisted upon adhering to strict rules of construction,[19] and ultimately announced its conclusion, that after all it is a question for the jury; that it cannot be said as a matter of law, in advance, how much gold or silver must be found in a vein before it will justify exploitation and properly be called a "known vein."[20]

[16] Bonner v. Meikle, 82 Fed. 697, 703, 19 Morr. Min. Rep. 83; Shoshone M. Co. v. Rutter, 87 Fed. 801, 808, 31 C. C. A. 223, 19 Morr. Min. Rep. 356; Ambergris Min. Co. v. Day, 12 Idaho, 108, 85 Pac. 109, 117; Fox v. Myers, 29 Nev. 169, 86 Pac. 793, 797; Ritter v. Lynch, 123 Fed. 930; Lange v. Robinson, 148 Fed. 799, 803, 79 C. C. A. 1.

[17] Iron S. M. Co. v. Campbell, 135 U. S. 286, 293, 10 Sup. Ct. Rep. 765, 34 L. ed. 155, 16 Morr. Min. Rep. 218.

[18] Iron S. M. Co. v. Cheesman, 116 U. S. 529, 537, 6 Sup. Ct. Rep. 481, 29 L. ed. 712.

[19] United States v. Iron S. M. Co., 128 U. S. 673, 676, 9 Sup. Ct. Rep. 195, 32 L. ed. 571.

[20] Iron S. M. Co. v. Mike & Starr Co., 143 U. S. 394, 405, 12 Sup. Ct. Rep. 543, 36 L. ed. 201, 17 Morr. Min. Rep. 436.

Judge De Witt, of the supreme court of Montana, in a dissenting opinion filed in the case of Shreve v. Copper Bell M. Co.,[21] and speaking for the court in the later case of Brownfield v. Bier,[22] reviewed all the adjudicated law upon the subject of what constitutes a "lode," as well as a "discovery," and clearly showed the reasons for the distinctions drawn between the two classes of cases.

To hold that, in order to constitute a discovery as the basis of the location, it must be demonstrated that the discovered deposit will, when worked, yield a profit, or that the lands containing it are, in the condition in which they are discovered, more valuable for mining than for any other purpose, would be to defeat the object and policy of the law.

It is enough if the vein or deposit has a present or prospective commercial value.[23] A location may be made and be valid when made. It may subsequently appear that the lands are not of the quality which would justify the issuance of a patent under the mining laws, but this would not determine the invalidity of the location.[24] A technical discovery does not of itself establish the patentable mineral character of the land, but it is sufficient to sanction a right of possession under the mining laws[25] which will prevail over subsequent locations embracing the same ground.[26]

What may constitute a sufficient discovery to warrant a location of a claim may be wholly inadequate

21 11 Mont. 309, 28 Pac. 315, 318.

22 15 Mont. 403, 39 Pac. 461, 462.

23 Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176, 178.

24 Clipper M. Co. v. Eli M. & L. Co., 33 L. D. 660; S. C., on review, 34 L. D. 401; Brophy v. O'Hare, 34 L. D. 596. See, also, Bevis v. Markland, 130 Fed. 226.

25 Instructions arguendo, 34 L. D. 201.

26 Bevis v. Markland, 130 Fed. 226, 228.

to justify the locator in claiming or exercising any rights reserved by the statutes. What constitutes a discovery that will validate a location is very different from what constitutes an apex to which attaches the statutory right to invade the possession of and appropriate the property which is presumed to belong to an adjoining owner.[27]

Most, if not all, of the decisions arising out of controversies between lode claimants on the one hand and the owners of prior patented placers on the other, or between the holders of title under patented townsites and parties asserting rights under the mining laws, insist that, to fulfill the designation of known lodes, or veins, which are reserved out of that class of patents, such lodes, or veins, must be clearly ascertained and be of such extent as to render the land more valuable on that account and *justify* their exploitation.[28]

No court has ever held that in order to entitle one to locate a mining claim ore of commercial value, in either quantity or quality, must first be discovered.[29] Such a theory would make most mining locations impossible.

> Logically carried out it would prohibit a miner from making any valid location until he had fully demonstrated that the vein, or lode, of quartz or other rock in place bearing gold or silver which he had discovered, would pay all the expenses of re-

[27] Grand Central Min. Co. v. Mammoth M. Co., 29 Utah, 490, 83 Pac. 648, 668.

[28] United States v. Iron S. M. Co., 128 U. S. 673, 683, 9 Sup. Ct. Rep. 195, 32 L. ed. 571; Deffeback v. Hawke, 115 U. S. 392, 404, 6 Sup. Ct. Rep. 95, 29 L. ed. 423; Davis v. Weibbold, 139 U. S. 507, 517, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; Dower v. Richards, 151 U. S. 658, 662, 14 Sup. Ct. Rep. 452, 38 L. ed. 305, 17 Morr. Min. Rep. 704. *Ante*, § 176.

[29] See Cascaden v. Bartolis, 146 Fed. 739, 741, 77 C. C. A. 496; S. C., second appeal, 162 Fed. 267, 89 C. C. A. 247; Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176.

moving, extracting, crushing, and reducing the ore, and leave a profit to the owner. If this view should be sustained, it would lead to absurd, injurious, and unjust results.[30]

It has been frequently said that a valid location may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following it, in expectation of finding ore, and such a location may be made of a ledge deep in the ground and appearing at the surface, not in the shape of ore, but in vein matter only.[31]

But Judge Ross, in speaking of petroleum lands, forcefully said:—

Mere indications, however strong, are not, in my opinion, sufficient to answer the requirements of the statute, which requires as one of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim. . . . . Indications of the existence of a thing is not the thing itself.[32]

An *expectation* is something more than a *hope*. A location made in the "hope of finding some ore in it

30 Judge Hawley in Book v. Justice M. Co., 58 Fed. 106, 124, 17 Morr. Min Rep. 617 (followed in Bonner v. Meikle, 82 Fed. 697, 703, 19 Morr. Min. Rep. 83).

31 Burke v. McDonald, 2 Idaho, 1022, 3 Idaho, 296, 29 Pac. 98, 101; Harrington v. Chambers, 3 Utah, 94, 1 Pac. 362, 373; Mont. Cent. Ry. v. Migeon, 68 Fed. 811, 814; Columbia Copper M. Co. v. Duchess M. M. & S. Co., 13 Wyo. 244, 79 Pac. 385, 386.

32 Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 675, 20 Morr. Min. Rep. 283. To same effect, see Tulare Oil Co. v. S. P. R. R. Co., 29 L. D. 269; Olive Land & D. Co. v. Olmstead, 103 Fed. 568, 578, 20 Morr. Min. Rep. 700; Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 1084, 74 Pac. 444; affirmed, Chrisman v. Miller, 197 U. S. 313, 321, 25 Sup. Ct. Rep. 468, 49 L. ed. 770; Bay v. Oklahoma Southern Gas & O. Co., 13 Okl. 425, 73 Pac. 936, 940; Weed v. Snook, 144 Cal. 439, 77 Pac. 1023, 1026; Whiting v. Straup, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849, 853.

at some time'' is worthless,[33] unless the hope should be realized before some one else makes a discovery. While the courts permit a liberal construction, the liberality must be exercised within reasonable and common-sense limits. Locations are not permitted upon a conjectural or imaginary existence of a vein.[34]

To constitute a discovery the law requires something more than conjecture, hope or even indication.[35]

There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence.[36]

Every crevice or seam in the rock, even if filled with vein matter, does not necessarily constitute a vein.[37] But something must be found to distinguish it from the surrounding mass.

> While the contents of ore-bearing veins widely differ, there is that indescribable peculiarity in the ledge matter, the matrix of all ledges, by which the experienced miner easily recognizes his vein when discovered.[38]

[33] Waterloo M. Co. v. Doe, 56 Fed. 685, 17 Morr. Min. Rep. 586.

[34] King v. Amy & Silversmith M. Co., 152 U. S. 222, 227, 14 Sup. Ct. Rep. 510, 38 L. ed. 419, 18 Morr. Min. Rep. 76.

[35] Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 1084; affirmed, Chrisman v. Miller, 197 U. S. 313, 321, 25 Sup. Ct. Rep. 468, 49 L. ed. 770.

[36] Erhardt v. Boaro, 113 U. S. 527, 536, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472; Shoshone M. Co. v. Rutter, 87 Fed. 801, 807, 31 C. C. A. 223, 19 Morr. Min. Rep. 356; Copper Globe M. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019, 1022, 21 Morr. Min. Rep. 296.

[37] Burke v. McDonald, 2 Idaho, 646, 33 Pac. 49, 50, 17 Morr Min. Rep. 325; Mont. Cent. Ry. v. Migeon, 68 Fed. 811, 813.

[38] Burke v. McDonald, 2 Idaho, 646, 33 Pac. 49, 50, 17 Morr Min. Rep. 325.

Judge Hallett was of the opinion that the discovery must be of vein matter *in place* in the form of a vein, or lode.[39]

Discovery of detached pieces of quartz, mere bunches, or "float," is not sufficient.[40]

Neither the size nor richness of the vein is material.[41]

Any *genuine* discovery is sufficient.[42]

While the courts may be unable to define with sufficient accuracy for all purposes what is necessary to constitute a discovery, they may have no difficulty in discriminating between the genuine and the counterfeit, the real and the sham.

The land department, whose function it is to determine in all applications for patent what constitutes a discovery, has uniformly adopted a liberal rule of construction. In the judgment of that tribunal, a mineral discovery sufficient to warrant the location of a mining claim may be regarded as proven when mineral is found and the evidence shows that a person of ordinary prudence would be justified in a further expenditure of his labor and means with a reasonable prospect of success.[43]

[39] Van Zandt v. Argentine M. Co., 8 Fed. 725, 727, 2 McCrary, 159, 4 Morr. Min. Rep. 441.

[40] Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 107, 11 Fed. 666, 675, 4 Morr. Min. Rep. 411; Book v. Justice M. Co., 58 Fed. 106, 120, 17 Morr. Min. Rep. 617.

[41] *Ante*, § 294.

[42] O'Donnell v. Glenn, 8 Mont. 248, 252, 19 Pac. 302.

[43] Castle v. Womble, 19 L. D. 455; Walker v. S. P. R. R. Co., 24 L. D. 172; Michie v. Gothberg, 30 L. D. 407; Chrisman v. Miller, 197 U. S. 313, 322, 25 Sup. Ct. Rep. 468, 49 L. ed. 770; Charlton v. Kelly, 156 Fed. 433, 436, 84 C. C. A. 295, 13 Ann. Cas. 518; Lange v. Robinson, 148 Fed. 799, 803, 79 C. C. A. 1; Garabaldi v. Grillo, 17 Cal. App. 540, 120 Pac. 425, 426; Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176, 178; In re Yard, 38 L. D. 59.

Expert testimony is permissible to establish this fact, as this is not a matter of "common knowledge."[44]

The value of a mineral deposit is a matter into which the government does not inquire as between two mineral claimants. Inquiries of this character are confined to controversies between mineral and agricultural claimants.[45]

There is a material difference between a discoverer being *willing* to spend his time and money in exploiting the ground and being *justified* in doing so. The former is a question to be answered by the miner himself; the latter would present a question for expert testimony and determination by a jury.[46]

But it would seem that the question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state which could not be satisfactorily proved. The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would *justify* a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property.[47]

[44] Wilson v. Harnette, 32 Colo. 172, 75 Pac. 395, 396.

[45] Tam v. Story, 21 L. D. 440.

[46] Burke v. McDonald, 2 Idaho, 1022, 3 Idaho, 296, 29 Pac. 98, 101.

[47] Text quoted, Chrisman v. Miller, 197 U. S. 313, 322, 25 Sup. Ct. Rep. 468, 49 L. ed. 790. Text cited and approved, Steele v. Tanana Mines R. Co., 148 Fed. 678, 680. Section commented on and criticised, Ambergris Mining Co. v. Day, 12 Idaho, 108, 85 Pac. 109, 113; McShane v. Kenkle, 18 Mont. 208, 56 Am. St. Rep. 578, 44 Pac. 979, 981, 33 L. R. A. 851; Bonner v. Meikle, 82 Fed. 697, 703, 19 Morr. Min. Rep. 83; Shoshone M. Co. v. Rutter, 87 Fed. 801, 808, 31 C. C. A. 223, 19 Morr. Min. Rep. 356; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1042, 19 Morr. Min. Rep. 650; Muldrick v. Brown, 37 Or. 185, 61 Pac. 428, 430; Michie v. Gothberg, 30 L. D. 407; Cascadin v. Bartolis, 146 Fed. 739, 741, 77 C. C. A. 496; S. C., second appeal, 162 Fed. 267, 89 C. C. A. 247;

To constitute a valid discovery upon a lode mining claim for which a patent is sought there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place possessing in and of itself a present or prospective value for mining purposes.[48]

In cases of surface placer deposits and veins or lodes with a visible outcrop, the embarrassments surrounding a locator in establishing a sufficient discovery are not as serious as they are in cases of deposits covered with overburden, or where, by reason of their nature and origin, surface indications or exposures are infrequent, if not entirely wanting. Actual discovery at the surface is impracticable in many cases. In some localities experience has taught the miner that certain surface conditions, such as what the miners term "blossom"—a local discoloration of the rocks resulting from oxidation, or seams to some extent mineralized—will, if followed, lead the prospector to merchantable ore, and justify location. In such a district where it has been demonstrated that there is a connection between these surface exposures and ore beneath, the courts have held that a location on such an exposure in the district is sufficient to authorize a location.

In Shoshone M. Co. v. Rutter[49] the circuit court of appeals for the ninth circuit said:—

> The discovery of seams containing mineral-bearing earth and rock, which were discovered before

Lange v. Robinson, 148 Fed. 799, 803, 79 C. C. A. 1; Charlton v. Kelly, 156 Fed. 433, 437, 84 C. C. A. 295, 13 Ann. Cas. 518; King Solomon Tunnel Co. v. Mary Verna M. Co., 22 Colo. App. 528, 127 Pac. 129, 133.

[48] East Tintic Cons. M. Co., 40 L. D. 271. Rehearing denied, 41 L. D. 255. See, also, Rough Rider et al. Lodes, 41 L. D. 242; rehearing denied, 41 L. D. 255; Jefferson-Montana Copper Mines Co., 41 L. D. 320.

[49] 87 Fed. 801, 807, 31 C. C. A. 223, 19 Morr. Min. Rep. 356.

the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which, by continued developments thereon, were found to be a part of a well-defined lode or vein containing ore of great value. The discovery made at the time of the Kirby location was therefore such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located.[50]

The supreme court of Idaho, in a case involving an ore occurrence similar to that considered in Shoshone M. Co. v. Rutter, expressed the following views:—

If a miner has discovered certain mineral indications which he has followed up with the result that a rich and valuable ore body has been developed therefrom, it seems clear that another miner finding similar indications and conditions on contiguous ground or in the immediate vicinity would be in a measure justified in following up these evidences with reasonable expectation of finding mineral deposits, and this is true even though the indications, rock and deposits found are such as the expert scientist, geologist and mineralogist in their finest theories tell him are not evidence of mineral deposits or even that they are evidences of the entire absence of mineral.[51]

The rule announced in these cases has been applied by analogy to what is known as "muck discoveries" in the Alaska placer regions. The "pay-streak" in

[50] See, also, Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. 1029, 1033, 19 Morr. Min. Rep. 485. This rule was followed in Columbia Copper M. Co. v. Duchess M. M. & S. Co., 13 Wyo. 244, 79 Pac. 385, 386.

[51] Ambergris Min. Co. v. Day, 12 Idaho, 108, 85 Pac. 109, 111. See East Tintic Cons. M. Co., 40 L. D. 271, where an attempt to apply this rule failed for reason that it had not been demonstrated in that district that there was any connection between the surface indications relied upon and the ore underneath. See, also, other cases cited under note 48, *supra*.

many cases is covered with detrital material, and the only indication of the existence of the placer deposits below which are found in ancient stream channels are the "colors" obtained from the surface overburden.[52]

These decisions show a marked liberality when compared with the rulings of the California courts in the case of oil placers. As a rule, the only appearance at the surface indicating the existence of oil below is occasional "oil seepages." These, as we have heretofore shown, are held not to be sufficient discoveries on which to predicate locations.[52a] To relieve the diligent locator from the embarrassments flowing from a lack of a technical discovery, the supreme court of California has equitably extended the doctrine of *pedis possessio* so as to protect the entire location from invasion by hostile locators so long as the claimant is in possession and is actually engaged in a search for oil.[53]

Another class of deposits of large commercial importance are the copper sulphides, also called in some localities "porphyry coppers." These consist, generally speaking, of zones or belts of copper sulphide formed by secondary enrichment. Originally the entire mass was impregnated with copper solution. A process of natural leaching has concentrated the mineral in horizons, so that at a distance below the surface the deposits are commercially profitable. The overburden or "capping," as it is colloquially called,

[52] Lange v. Robinson, 148 Fed. 799, 803, 79 C. C. A. 1; Charlton v. Kelly, 156 Fed. 433, 436, 84 C. C. A. 295, 13 Ann. Cas. 518.

[52a] See, also, Dean v. Omaha-Wyoming Oil Co. (Wyo.), 128 Pac. 881, 884.

[53] Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 1085, 74 Pac. 444; Weed v. Snook, 144 Cal. 439, 77 Pac. 1023, 1025; Merced Oil Co. v. Patterson, 153 Cal. 624, 96 Pac. 90. See, also, Whiting v. Straup, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849, 855; Phillips v. Brill, 17 Wyo. 26, 95 Pac. 856, 859.

is as a rule practically barren, constituting the leached rock. Technical discoveries can only be made through drilling, as in the case of oil. No reported litigation has arisen in the courts as to these deposits over the questions here discussed, but the land department as a rule requires a demonstration of ore bearing quality of the deposit, by means of shafts or tunnels or drill holes penetrating the ore.[53a]

In determining the sufficiency of a given discovery, the land department considers the element of good faith as an important factor. It cannot be denied that this department has recently assumed a somewhat rigid attitude in cases of the nonmetallic deposits of large commercial importance such as oil, phosphates, and potash, owing to the tendency of combinations to absorb large areas of these products. The proposed conservation measures discussed in a previous section,[54] if adopted by congress, will, however, place this character of deposits in a category by themselves, to be dealt with by methods radically different from those now in force.

With reference to lodes and veins, Judge Hawley's definition seems to answer all practical purposes:—

> When the locator finds rock in place containing mineral, he has made a discovery within the meaning of the statute, whether the earth or rock is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery and warrants the prospector in making a location of a mining claim.[55]

53a See cases cited under note 48, *supra*.

54 § 200.

55 Book v. Justice M. Co., 58 Fed. 106, 120, 17 Morr. Min. Rep. 617; Shoshone M. Co. v. Rutter, 87 Fed. 801, 807, 31 C. C. A. 223, 19 Morr. Min. Rep. 356.

The question of "discovery" will be found discussed to a limited extent

§ 337. Where such discovery must be made.—It is almost unnecessary to repeat what we have heretofore said, that title to a mining claim can only be initiated by discovery upon the unappropriated lands of the government.[56] No rights are acquired by an entry within the surface lines of patented lands,[57] or other lands which are withdrawn from the body of the public domain.[58]

The discovery must be made within the limits of the location as it is ultimately marked upon the ground.[59]

in the following cases, not heretofore cited: Southern Cross M. Co. v. Europa M. Co., 15 Nev. 383, 385; Territory v. McKey, 8 Mont. 168, 19 Pac. 395, 396; Davidson v. Bordeaux, 15 Mont. 245, 38 Pac. 1075, 1076; Golden Terra M. Co. v. Mahler, 4 Morr. Min. Rep. 390, 4 Pac. C. L. J. 405; United States v. King, 9 Mont. 75, 22 Pac. 498.

[56] Sands v. Cruikshank, 15 S. D. 142, 87 N. W. 589; McPherson v. Julius, 17 S. D. 98, 95 N. W. 428, 435; Garabaldi v. Grillo, 17 Cal. App. 540, 120 Pac. 425, 426.

[57] Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69, 71; Golden Terra M. Co. v. Mahler, 4 Morr. Min. Rep. 390, 4 Pac. C. L. J. 405; Brewster v. Shoemaker, 28 Colo. 176, 89 Am. St. Rep. 188, 63 Pac. 309, 310, 53 L. R. A. 793, 21 Morr. Min. Rep. 155; Kirk v. Meldrum, 28 Colo. 453, 65 Pac. 633, 635, 21 Morr. Min. Rep. 393.

[58] Michael v. Mills, 22 Colo. 439, 45 Pac. 429, 430; Armstrong v. Lower, 6 Colo. 393. See, *ante*, § 322; Branagan v. Dulaney, 2 L. D. 744; Winter Lode, 22 L. D. 362.

[59] Gwillim v. Donnellan, 115 U. S. 45, 50, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15 Morr. Min. Rep. 482; Larkin v. Upton, 144 U. S. 19, 23, 12 Sup. Ct. Rep. 614, 36 L. ed. 330, 17 Morr. Min. Rep. 465; Upton v. Larkin, 7 Mont. 449, 17 Pac. 728, 731, 15 Morr. Min. Rep. 404; S. C., 5 Mont. 600, 6 Pac. 66, 68; Cheesman v. Shreeve, 40 Fed. 787, 790, 17 Morr. Min. Rep. 260; Michael v. Mills, 22 Colo. 439, 45 Pac. 429; Girard v. Carson, 22 Colo. 345, 44 Pac. 508, 18 Morr. Min. Rep. 346; Dean v. Omaha-Wyoming Oil Co. (Wyo.), 128 Pac. 881, 883.

A rather severe application of this rule is found in the case of Waskey v. Hammer, 170 Fed. 31, 35, 95 C. C. A. 305. Waskey made a valid discovery at a time when he was a qualified locator. His location was excessive. On discovering this he drew in his lines and excluded his discovery point. In the meanwhile he became a deputy mineral surveyor, then made a new discovery within the limits of his claim. But being disqualified at that time from locating, his new discovery could

A location based upon a discovery made within the limits of another existing and valid location is void.[60]

It is, however, essential that the senior locator make timely assertion of his rights by adversing the application of the junior locator, else he is barred from afterward charging that the claimed discovery of the

not avail him and he lost his claim. The supreme court of the United States affirmed the ruling. 223 U. S. 85, 90, 32 Sup. Ct. Rep. 187, 56 L. ed. 359.

60 Belk v. Meagher, 104 U. S. 279, 284, 26 L. ed. 735, 1 Morr. Min. Rep. 510; Farrell v. Lockhart, 210 U. S. 142, 146, 28 Sup. Ct. Rep. 681, 52 L. ed. 994, 16 L. R. A., N. S., 162 (qualifying Lavagnino v. Uhlig, 198 U. S. 443, 453, 49 L. ed. 1123, 25 Sup. Ct. Rep. 716); Swanson v. Sears, 224 U. S. 180, 32 Sup. Ct. Rep. 455, 56 L. ed. 221; affirming Swanson v. Kettler, 17 Idaho, 321, 105 Pac. 1059, 1065; Brown v. Gurney, 201 U. S. 184, 191, 26 Sup. Ct. Rep. 509, 50 L. ed. 717; affirming Gurney v. Brown, 32 Colo. 472, 77 Pac. 357, 359; Peoria & Colorado M. & M. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915, 917; Hoban v. Boyer, 37 Colo. 185, 85 Pac. 837; Moffatt v. Blue River Gold Ex. Co., 33 Colo. 142, 80 Pac. 139, 140; Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054; Lockhart v. Farrell, 31 Utah, 155, 86 Pac. 1077, 1078; Sierra Blanca M. & R. Co. v. Winchell, 35 Colo. 13, 83 Pac. 628; Moorhead v. Erie M. & M. Co., 43 Colo. 408, 96 Pac. 253, 255; Ambergris M. Co. v. Day, 12 Idaho, 108, 85 Pac. 109, 113; Swanson v. Kettler, 17 Idaho, 321, 105 Pac. 1059, 1062; S. C., on rehearing, 105 Pac. 1065; Snowy Peak M. Co. v. Tamarack & C. M. Co., 17 Idaho, 630, 107 Pac. 60, 61; Bergquist v. West Virginia W. Copper Co., 18 Wyo. 234, 106 Pac. 673, 682; Helena G. & I. Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455, 459; Tiggeman v. Mrziak, 40 Mont. 19, 105 Pac. 77, 81; Street v. Delta M. Co., 42 Mont. 371, 112 Pac. 701, 704; Tuolumne Cons. M. Co. v. Maier, 134 Cal. 583, 66 Pac. 863, 864, 21 Morr. Min. Rep. 678; McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823, 825; McPherson v. Julius, 17 S. D. 98, 95 N. W. 428, 435; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 285; Watson v. Mayberry, 15 Utah, 265, 49 Pac. 479, 482; Reynolds v. Pascoe, 24 Utah, 219, 66 Pac. 1064, 1065; Nash v. McNamara, 30 Nev. 114, 133 Am. St. Rep. 694, 93 Pac. 405, 407, 16 L. R. A., N. S., 168; Little Pittsburgh Cons. v. Amie M. Co., 17 Fed. 57, 58, 5 McCrary, 298; Erwin v. Perigo, 93 Fed. 608, 611, 35 C. C. A. 482; Crown Point M. Co. v. Buck, 97 Fed. 462, 465, 38 C. C. A. 278; Malone v. Jackson, 137 Fed. 878, 880, 70 C. C. A. 216; Becker v. Long, 196 Fed. 721; Branagan v. Dulaney, 2 L. D. 744; In re Williams, 20 L. D. 458; Golden Link M. L. & B. Co., 29 L. D. 384.

junior lode applicant is in fact on land appropriated by the senior location.[61]

Whether such a location would or could in any event become validated if the senior locator should abandon his location or fail to perform the annual work rendering the senior claim subject to relocation will be discussed later.[62]

If a senior location includes the apex of a vein, and is so located that it has extralateral rights, a junior claimant can predicate no rights upon a discovery made upon the dip of such vein and within the extralateral rights of the senior location.[63] The reason for this rule is, that the extralateral portion of the vein has been withdrawn from the public domain to the same extent as that portion of the vein within the surface boundaries.[64]

But if the apex has not been appropriated by a valid location, or if it has been so appropriated as to leave an underground segment of the vein unappropriated, a discovery of such unappropriated segment would be sufficient, except as against one subsequently locating a portion of the apex in such a manner as to include the underground segment of the vein within the extralateral rights of his claim.[65]

We are not to be understood as stating that the locator of such an unappropriated segment of a vein would be entitled to extralateral rights. That question will be discussed in a subsequent chapter.

61 American Cons. M. & M. Co. v. De Witt, 26 L. D. 580; Mitchell v. Brovo, 27 L. D. 40; Stranger Lode, 28 L. D. 321.

62 *Post*, § 645a.

63 Bunker Hill & Sullivan M. & C. Co. v. Shoshone M. Co., 33 L. D. 142.

64 Golden Link M. L. Co., 29 L. D. 384.

65 *Ante*, § 314; *post*, § 364; and see Doe v. Waterloo M. Co., 54 Fed. 935, 937; Parrot Silver & Copper Co. v. Heinze, 25 Mont. 139, 87 Am. St. Rep. 386, 64 Pac. 326, 328, 53 L. R. A. 491, 21 Morr. Min. Rep. 232.

It is no proof of discovery within the limits of a location that a vein discovered in another location *may* penetrate the ground sought to be located, where there is no outcrop in the latter, and no physical evidence of the existence of the vein.[66]

Any portion of the apex on the course, or strike, of the vein found within the limits of a claim is sufficient discovery to entitle the locator to obtain title.[67]

It has been held that where a vein has been discovered far below the surface, a valid location can be made by marking the boundary on the surface so as to include the place at which the vein, if continued to the surface, would be disclosed,[68] in the absence of some proof that the actual position of the apex is outside of the claim as located, and the location itself would be subject to the extralateral right of a subsequent locator covering the apex if it was subsequently discovered outside of the limits of the prior location.

In the case of Reynolds v. Pascoe,[69] the supreme court of Utah said:—

> The same discovery point cannot be used for the location of two or more claims on the public domain.

In this case B. located a mining claim called the Chief running north and south; a few days later he

[66] Michael v. Mills, 22 Colo. 439, 45 Pac. 429, 430; Silver Jennie Lode, 7 L. D. 6.

[67] Larkin v. Upton, 144 U. S. 19, 23, 12 Sup. Ct. Rep. 614, 36 L. ed. 330, 17 Morr. Min. Rep. 465; Upton v. Larkin, 5 Mont. 600, 6 Pac. 66, 67; S. C., 7 Mont. 449, 17 Pac. 728, 732, 15 Morr. Min. Rep. 404; Golden Terra M. Co. v. Mahler, 4 Morr. Min. Rep. 390, 4 Pac. C. L. J. 405.

[68] Brewster v. Shoemaker, 28 Colo. 176, 89 Am. St. Rep. 188, 63 Pac. 309, 310, 53 L. R. A. 793, 21 Morr. Min. Rep. 155. But on the question of discovery work under state statutes in cases of this kind, the supreme court of Montana holds that it must be done from the surface, indicating that what is said on the subject in Brewster v. Shoemaker is *obiter*. Butte Consol. M. & M. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 303; S. C., on rehearing, 90 Pac. 177.

[69] 24 Utah, 219, 66 Pac. 1064, 1065.

located the Ada, placing his lines across the Chief. The discovery monuments of both claims were where the vein in the Chief and the vein in the Ada crossed. The Ada discovery was within the limits of the Chief. All work done was within the same limits. Subsequently a claim called Oregon No. 2 was located adversely to the two prior locations and conflicting with the Ada. B. defended, setting up title to the Ada. The contention was successfully made that the Ada was invalid because its discovery was within the limits of the Chief, a prior location. Manifestly both the Ada and Chief could not have been valid.

In the case of Poplar Consolidated Quartz Mine[70] there was a discovery in a discovery shaft bisecting a common end-line of two lode claims, located on the same day by two different locators, Bull and Braden. Braden transferred his claim to Bull, who in turn transferred both to Bigelow, who applied for patent. The discovery shaft was sixty feet deep, and developed a ledge from six to ten feet in thickness. The secretary of the interior decided as follows:—

> There was but one discovery upon which both these locations were made. Both Bull and Braden may have discovered the vein or lode, but each could not claim the discovery as his own. It was one discovery made by two men and only entitled the two or either of them to make one location. If the law be so construed as to allow two locations in a case like this, it would also have to uphold that one discovery would entitle the discoverer to make four locations, placing one-fourth of the discovery to the credit of each. The law is not susceptible of any such construction. A discovery is a whole and may not be divided and parcelled out among the discoverers.

[70] 16 L. D. 1.

The language employed is somewhat extravagant. It would be impossible to mark off four lode locations, including a common discovery shaft, without such a surface conflict as would invalidate at least two of them, under the doctrine of the Utah case *supra*.

If we assume that a part of the apex was disclosed in each claim, we do not see why there could not be two locations, as there would then be practically two discoveries. Any part of the apex on the course of the vein found within a claim justifies a location.[71] As was said by the supreme court of the United States:—

> Indeed, it would seem from some of the testimony that the course or strike of this vein was not exactly along the boundary line between the Comanche and the Shannon, but varying somewhat therefrom; hence, the apex in its full width and with some portions of its length might be found in each claim and so discovered justify the discoverer in obtaining title to each.[72]

In the case of McKinstry v. Clark,[73] the trial court charged the jury in effect that a party claiming two locations founded on one discovery had a right to make one of them, and the burden of proof was on his adversary to show which one was first located. There is no adequate statement of facts disclosing the situation. The supreme court of Montana reversed the case, assigning as one of the reasons error of the trial court in instructing the jury as to the burden of proof. The instructions generally were conflicting and misleading. The point here under discussion was not decided.

[71] *Ante*, § 337; *post*, § 364.

[72] Larkin v. Upton, 144 U. S. 19, 23, 12 Sup. Ct. Rep. 614, 36 L. ed. 330. See, also, Tiggeman v. Mrzlak, 40 Mont. 19, 105 Pac. 77, 81; Healey v. Rupp, 28 Colo. 102, 63 Pac. 319, 21 Morr. Min. Rep. 117.

[73] 4 Mont. 370, 1 Pac. 759, 761.

Where the state laws require the sinking of a discovery shaft on each claim as a part of the location work, a shaft sunk on a common boundary of two claims would not satisfy the law as to either unless its dimensions were larger than is customary. It is possible that some of the courts and the land department have confused the idea of the discovery with the discovery shaft. This suggestion seems to have occurred to Mr. Morrison, who says, citing the above cases as authority: "The attempt to locate two full claims upon one discovery *shaft* is a palpable fraud,"[74] emphasizing the word *shaft* by italics.

If we eliminate the legal necessity of a discovery shaft and confine ourselves to the disclosure of a vein, the apex of which crosses a common boundary, there is no reason in law or morals why two locations could not be made, by the same or different persons, each based upon the disclosure of a part of the apex within each claim.

To what extent, if any, the rules relating to discovery which have thus far been formulated as to lodes may be applied by analogy to placers, will be discussed in subsequent sections.[74a]

§ 338. The effect of the loss of discovery upon the remainder of the location.—As the discovered lode must lie within the limits of a location which is made by reason of it, if the title to the discovery fails and the lode is not shown to exist in other portions of the claim, the title to the location fails.

If there is but one point of discovery and all workings are done at that point, a patent issued to another

[74] Morr. Min. Rights, 14th ed., p. 53.

[74a] *Post*, § 437. As to boundary line discoveries in oil placers, see § 438a.

claimant covering the place of working restores the remainder of the ground to the public domain.[75]

Where, however, a new discovery is made and work prosecuted thereon in good faith, loss of the original discovery point by patent to another will not work a loss of the balance of the claim.[76]

Nor will a prior location be lost where a junior locator is allowed to obtain, without contest, a patent which includes a portion of the prior claim containing the discovery, under an agreement to reconvey such portion to the prior claimant after patent, provided the acts of the parties are in good faith.[77]

Where the owner of location applies for and receives a patent himself for a part of the claim which includes his original discovery, this is not necessarily an abandonment of the other part, where it appears that the lode exists in the excluded part, and is subsequently worked on by the owner.[78]

A patent applicant, however, may in the patent proceeding relinquish a part of his claim so as to restore it to the public domain.[79]

The land department refuses to issue a patent upon an application from which is excepted the land con-

[75] Gwillim v. Donnellan, 115 U. S. 45, 50, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15 Morr. Min. Rep. 482; Miller v. Girard, 3 Colo. App. 278, 33 Pac. 69; Girard v. Carson, 22 Colo. 345, 44 Pac. 508, 18 Morr. Min. Rep. 346; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 285; Miller v. Hamley, 31 Colo. 495, 74 Pac. 980, 982; Indiana-Nevada M. Co. v. Gold Hills M. & M. Co. (Nev.), 126 Pac. 965, 967.

[76] Silver City G. & S. M. Co. v. Lowry, 19 Utah, 334, 57 Pac. 11, 13, 20 Morr. Min. Rep. 55; Bingham Amalgamated Copper Co. v. Ute C. Co., 181 Fed. 748, 750.

[77] Duxie Lode, 27 L. D. 88.

[78] Miller v. Hamley, 31 Colo. 495, 74 Pac. 980, 982; Peoria & Colorado M. & M. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915, 918.

[79] Gurney v. Brown, 32 Colo. 472, 77 Pac. 357, 359; Brown v. Gurney, 201 U. S. 184, 193, 26 Sup. Ct. Rep. 509, 50 L. ed. 717.

taining the discovery shaft and improvements, where the proof fails to show the discovery or existence of mineral on the claim as applied for.[80]

This rule, however, in so far as it involves the loss of the discovery shaft, is said to be limited to states where statutes are in force requiring the sinking of discovery shafts or their equivalents.[81]

Where, in drawing in the lines of a claim for the purpose of casting off excess, the discovery is excluded, the original location falls, and a new discovery is essential to maintain the integrity of the location.[82]

A lode claim which is intersected by a patented millsite must be confined to that part which contains a discovery shaft and improvements,[83] unless a valid discovery of the same vein can be shown upon the other part.[84]

Such showing will authorize the entry of such remainder, as in such case it is not restored to the public domain.[85]

And the applicant may be permitted, after entry at the local land office, and prior to patent, to establish these facts by supplemental proof.[86]

The rule that a patent may not be issued for both parts of a lode claim which is intersected by a millsite

80 In re J. G. Kennedy, 10 Copp's L. O. 150; Antediluvian Lode, 8 L. D. 602; Independence Lode, 9 L. D. 571; Lone Dane Lode, 10 L. D. 53; In re Thomas J. Laney, 9 L. D. 83; Hidden Treasure Lode, 29 L. D. 156; S. C., on review, 29 L. D. 315.

81 Bingham Amalgamated Copper Co. v. Ute C. Co., 181 Fed. 748, 750.

82 Waskey v. Hammer, 170 Fed. 31, 34, 95 C. C. A. 305; affirmed, 223 U. S. 85, 32 Sup. Ct. Rep. 187, 56 L. ed. 359.

83 Andromeda Lode, 13 L. D. 146; Mabel Lode, 26 L. D. 675.

84 Paul Jones Lode, 31 L. D. 359.

85 In re Hagland, on review, 1 L. D. 593; Paul Jones Lode, 31 L. D. 359; Perigo v. Erwin, 85 Fed. 904, 906, 19 Morr. Min. Rep. 269; Erwin v. Perigo, 93 Fed. 608, 612, 35 C. C. A. 482.

86 Spur Lode, 4 L. D. 160.

does not apply to a lode claim which is intersected by a placer claim.[87]

It was formerly held[88] that if a lode claim is intersected by a prior lode location, both parts of such intersected claim could not be retained. But under the recent decisions of the department we think the opposite conclusion would be reached.[89]

The supreme court of Utah has held that where the original discovery of a lode claim has been included within the patent lines of a junior claim, but before the issuance of such patent a discovery is made on that portion of the senior location not included within the junior claim, such senior location is valid.[90]

The supreme court of California has attempted to qualify the rule announced by the supreme court of the United States in Gwillim v. Donnellan,[91] and which has been followed uniformly by the land department, in a case where the discovery and workings were embraced within an agricultural patent, the mining locator subsequently acquiring the agricultural title.[92]

The court evidently strained the law to avoid sanctioning what it deemed an injustice. Work done on the patented agricultural land, if it had a manifest tendency to develop that part of the location excluded

87 The Vulcano Lode M. Claim, 30 L. D. 482.

88 Silver Queen Lode, 16 L. D. 186.

89 Paul Jones Lode, 31 L. D. 359; Hidee Gold M. Co., 30 L. D. 420; Alice Lode M. Claim, 30 L. D. 481. See Crown Point G. M. Co. v. Buck, 97 Fed. 462, 465, 38 C. C. A. 278.

90 Silver City G. & S. M. Co. v. Lowry, 19 Utah, 334, 57 Pac. 11, 13, 20 Morr. Min. Rep. 55; Tonopah & Salt Lake M. Co. v. Tonopah M. Co., 125 Fed. 408, 415; Waskey v. Hammer, 170 Fed. 31, 35, 95 C. C. A. 305; Bingham Amalgamated Copper Co. v. Ute Copper Co., 181 Fed. 748, 749. See Paul Jones Lode, 28 L. D. 120, 31 L. D. 359.

91 115 U. S. 45, 50, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15 Morr. Min. Rep. 482.

92 Richards v. Wolfling, 98 Cal. 195, 32 Pac. 971, 972.

from the agricultural entry, would be considered in law as the equivalent of work done within the limits of the claim. But a discovery, without which no location possesses any potential force or vitality, once passing by patent to another, can no more be used as the basis of acquiring title to unpatented lands, although held by the same owner, than can a discovery in one mining claim be used as the basis of locating another. Certainly, no patent could ever be obtained to the remainder of the mining claim upon the facts shown in the California case, unless other discoveries were made within such remainder. It is manifest that the ruling of the supreme court of California is opposed to the weight of authority. Loss of discovery results in loss of location, unless a new discovery is made within the excluded ground prior to the inception of intervening rights. Such new discovery will save the remainder from reverting to the body of the public domain.[93]

The effect of a conveyance of a part of an unpatented mining location upon the remainder will be considered in a subsequent section.[94]

§ 339. Extent of a locator's right after discovery and prior to completion of location.—Discovery is but one step in acquiring title to a mining claim. It must be followed by location.[95]

[93] This course was pursued by a locator who made an excessive location and in casting off the excess excluded his discovery. He subsequently made a new discovery within the amended limits, but in the meanwhile, having become disqualified by reason of being appointed deputy mineral surveyor, the new discovery did not avail him and he lost his property to a relocator. Waskey v. Hammer, 170 Fed. 31, 35, 95 C. C. A. 305; affirmed, 223 U. S. 85, 32 Sup. Ct. Rep. 187, 56 L. ed. 359.

[94] *Post*, § 618b.

[95] Adams v. Crawford, 116 Cal. 495, 48 Pac. 488, 489.

When a prospector has made such a discovery as will satisfy the law and form the basis of the location, he is allowed, in most of the states, a specified time in which to perform the remaining acts which are requisite to perfect the location. As to whether, in the absence of such legislation and district rules, the discoverer has any appreciable time within which to mark his boundaries and complete his location is a subject upon which the courts differ. The supreme court of California has held that while if the locator be on the ground actually engaged in making the location, another could not locate over him, yet, in the absence of local rules authorizing it, no time is allowed to perfect the location; that until it is actually marked on the ground the claim is not appropriated so as to prevent its acquisition by a subsequent locator.[96]

This rule was followed by the supreme court of Oregon.[97]

The supreme court of New Mexico has held that under the laws of that territory such a perfected notice of location as will, when recorded, fulfill the requirements of the federal statutes must be posted contemporaneously with discovery.[98]

The circuit court of appeals for the ninth circuit was called upon to determine the question upon the same evidence and the same state of facts arising in one of the California cases,[99] and that tribunal declined to accept the rule announced by the California courts. The

[96] Newbill v. Thurston, 65 Cal. 419, 4 Pac. 409, 410; Pharis v. Muldoon, 75 Cal. 284, 17 Pac. 70, 71, 15 Morr. Min. Rep. 348. See McCleary v. Broaddus, 14 Cal. App. 60, 111 Pac. 125, 127.

[97] Patterson v. Tarbell, 26 Or. 29, 37 Pac. 76, 78. See *post*, § 372.

[98] Deeney v. Mineral Creek M. Co., 11 N. M. 279, 67 Pac. 724, 725, 22 Morr. Min. Rep. 47.

[99] Newbill v. Thurston, 65 Cal. 419, 4 Pac. 409, 410.

court of appeals held that after a discovery and posting a notice thereof the locator had a reasonable time in which to complete the location; what was a reasonable time would depend upon the facts of each particular case; that evidence of customs prevalent in other localities on this subject might be received for the purpose of aiding the court in its determination, and that, under the circumstances of that case, twenty days was a reasonable time.[100]

The doctrine announced by the circuit court of appeals is in consonance with the views expressed by the supreme courts of Nevada,[1] Idaho,[2] Montana,[3] Utah,[4] and Washington,[5] and accords with the spirit of the law as interpreted by the supreme courts of Colorado,[6] South Dakota,[7] and the supreme court of the United States.[8]

To hold that the miner, as soon as he discovers a lode, must immediately stake the territory which he is entitled to claim, in order to protect it from invasion

100 Doe v. Waterloo M. Co., 70 Fed. 455, 459, 17 C. C. A. 190, 18 Morr. Min. Rep. 265; affirming decision of Judge Ross, Doe v. Waterloo, 55 Fed. 11.

1 Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312, 329; Gleeson v. Martin White M. Co., 13 Nev. 442; testimony of Chief Justice Beatty, Rep. Pub. Land Com. 399; Tonopah & Salt Lake M. Co. v. Tonopah M. Co., 125 Fed. 389, 396.

2 Burke v. McDonald, 2 Idaho, 646 (679), 33 Pac. 49, 50, 17 Morr. Min. Rep. 325.

3 Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1045, 19 Morr. Min. Rep. 650.

4 Brockbank v. Albion M. Co., 29 Utah, 367, 81 Pac. 863.

5 Union M. & M. Co. v. Leitch, 24 Wash. 585, 85 Am. St. Rep. 961, 64 Pac. 829, 830.

6 Murley v. Ennis, 2 Colo. 300; Patterson v. Hitchcock, 3 Colo. 533.

7 Marshall v. Harney Peak Tin M. Co., 1 S. D. 350, 47 N. W. 290, 293.

8 Erhardt v. Boaro, 113 U. S. 527, 535, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472.

and claims of other persons, would be an unreasonable, if not impossible, requirement.[9]

What is a reasonable time for the completion of the location depends upon the nature of the ground to be located, the means of properly marking, and the ability to properly ascertain the dimensions and course, or strike, of the vein.[10]

As so much depends upon the locator determining the position of his vein in the earth and the course of its apex, and as a failure to make his location and establish his end-lines as the law contemplates is accompanied with such serious results, it would seem that congress never intended to compel the discoverer to immediately proceed at his peril with the marking of his boundaries. The posting of a preliminary notice, though not specially authorized by statute, should be sufficient to protect the discoverer for a reasonable time, at least, within which he might determine approximately the all-important facts upon which the value of his property to a great degree depends.[11]

What is a reasonable time is a question of law [12] and depends upon the circumstances of each case.[13]

In states or localities where the laws or district regulations fix a given time within which certain acts subsequent to the discovery are required to be performed, the posting of a preliminary notice, specifying

9 Omar v. Soper, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443, 445, 15 Morr. Min. Rep. 496; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1045, 19 Morr. Min. Rep. 650.

10 Doe v. Waterloo M. Co., 70 Fed. 455, 460, 17 C. C. A. 190, 18 Morr. Min. Rep. 265.

11 Union M. & M. Co. v. Leitch, 24 Wash. 585, 85 Am. St. Rep. 961, 64 Pac. 829, 830.

12 Patterson v. Hitchcock, 3 Colo. 533, 540.

13 Union M. & M. Co. v. Leitch, 24 Wash. 585, 85 Am. St. Rep. 961, 64 Pac. 829, 830.

the name of the lode, date of discovery, and the intention to locate the claim, is equivalent to actual possession,[14] and no adverse rights may be initiated until after the lapse of that period.[15]

Whenever preliminary work is required to define and describe the claim located, the first discoverer must be protected in the possession of the claim until sufficient excavations and development can be made to disclose whether a vein or deposit of such richness exists as to justify the work to extract the metal.[16]

Otherwise, the whole purpose of allowing the free exploration of the public lands for the precious metals would in such cases be defeated, and force and violence in the struggle for possession, instead of previous discovery, would determine the rights of the claimants.[17]

The effect of this rule is practically to reserve, after the discovery and during the statutory period allowed for perfecting the claim, a surface area circular in form, the radius of which may be the length claimed on the discovered lode, within which area the location may be ultimately made. "The locator may use his discovery as a pivot, and move his lines, at least in

[14] Erhardt v. Boaro, 8 Fed. 692, 693, 2 McCrary, 141, 4 Morr. Min. Rep. 432.

[15] Sierra Blanca M. & R. Co. v. Winchell, 35 Colo. 13, 83 Pac. 628; Ferris v. McNally (Mont.), 121 Pac. 889, 892; Nash v. McNamara, 30 Nev. 114, 133 Am. St. Rep. 694, 93 Pac. 405, 406, 16 L. R. A., N. S., 168; Farrell v. Lockhart, 210 U. S. 142, 145, 28 Sup. Ct. Rep. 681, 52 L. ed. 994, 16 L. R. A., N. S., 162; Moorhead v. Erie M. & M. Co., 43 Colo. 408, 96 Pac. 253, 255. Question mooted but not decided in Bergquist v. West Virginia & Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673, 683.

[16] Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1045, 19 Morr. Min. Rep. 650; Ferris v. McNally (Mont.), 121 Pac. 889, 892.

[17] Erhardt v. Boaro, 113 U. S. 527, 535, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472; Marshall v. Harney Peak Tin M. Co., 1 S. D. 350, 47 N. W. 290, 293; Omar v. Soper, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443, 446, 15 Morr. Min. Rep. 496.

the general course of his vein given in his notice, so as to secure the full benefit of his discovery.''[18]

Such is the manifest intent of the rule. This was the custom under the act of 1866. The miner posted his notice, claiming so many linear feet on the vein; and under the law as then interpreted, prior to fixing the *situs* of his lode, by filing a diagram for patent purposes, he might follow the vein wheresoever it ran to the length claimed.[19]

When he filed his diagram and inclosed his lode within surface boundaries, his right to pursue the vein on its course ceased where it passed out of his surface lines.[20]

Under the existing state of the law, the location must be marked within a certain period of time, whereupon the locator's rights become definitely fixed and confined, except as to the extralateral right, to his marked boundaries. Until this is done, however, and within the prescribed periods, his right to be protected to the extent heretofore stated is well settled.[21]

If, however, he marks his boundaries indicating the extent of the location without waiting for the time allowed him, and other locations are made, guided by the boundaries as marked, he will not be permitted subsequently to swing his location so as to include the surface of the intervening locations.[22]

18 Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1046, 19 Morr. Min. Rep. 650; Helena G. & I. Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455, 458.

19 Johnson v. Parks, 10 Cal. 447. See *ante*, § 58.

20 *Ante*, § 60.

21 Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1045, 19 Morr. Min. Rep. 650; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 20 Morr. Min. Rep. 103; Ferris v. McNally (Mont.), 121 Pac. 889, 892; Helena Gold M. Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455, 458.

22 Wiltsee v. King of Arizona M. & M. Co., 7 Ariz. 95, 60 Pac. 896, 898.

If he fails to comply with the law within the statutory period, his rights would thereafter be no greater than the rights of one in possession without discovery. He might protect his *pedis possessio* against forcible intrusion and hold it against one having no higher right;[23] but he would be a mere occupant without color of title, and his possession must yield to anyone possessing the necessary qualifications, who enters peaceably and in good faith for the purpose of perfecting a valid location.[24]

We have heretofore said that no adverse rights may be initiated until after the lapse of the period allowed by the statute to perfect the location. As to whether the rights of intervening locators would become validated by the lapse of the period and failure of the first locator to perform all of the requisite acts, it would seem that the analogy of junior locators overlapping senior claims[25] should apply, and that the intervening location should be void *ab initio*. The ground would not become subject to location until the lapse of the statutory time, no rights accruing to the intervening locator by reason of the premature relocation.

The supreme court of Montana has expressed the view that if the senior locator, having performed the first step in the series, neglects to perform the others, the junior locator might be able to assert his rights. In other words, in the opinion of the court, other prospectors may locate within the area during the period, and upon the lapse of the statutory time and failure of

[23] Crossman v. Pendery, 8 Fed. 693, 694, 2 McCrary, 139, 4 Morr. Min. Rep. 431; Field v. Grey, 1 Ariz. 404, 25 Pac. 793, 794. See Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 14, 50 C. C. A. 79, 21 Morr. Min. Rep. 633.

[24] See *ante*, "Occupancy Without Color of Title," §§ 216–219; Willeford v. Bell (Cal.), 49 Pac. 6.

[25] A full discussion of this question will be found *post*, § 645a.

the senior locator to perform all the required acts, the junior location would be valid, the failure of the senior to comply with the law automatically inuring to the benefit of the junior locator.[26]

The decision in this case, however, was based upon the opinion of the supreme court of the United States in Lavagnino v. Uhlig,[27] which, however, was subsequently overruled.[28]

We think the great weight of authority is in favor of the doctrine that the intervening location would be absolutely void.[29]

Article IV. The Discovery Shaft and Its Equivalent.

§ 343. State legislation requiring development work as prerequisite to completion of location.
§ 344. Object of requirement as to development work.
§ 345. Relationship of the discovery to the discovery shaft.
§ 346. Extent of development work.

§ 343. State legislation requiring development work as prerequisite to completion of location.—Of the precious metal-bearing states, California and Utah have thus far enacted no laws requiring work of any character to be performed as a prerequisite to the

[26] Helena Gold and Iron Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455, 459; approved in the later case of Street v. Delta M. Co., 42 Mont. 371, 384, 112 Pac. 701, 705.

[27] 198 U. S. 453, 25 Sup. Ct. Rep. 716, 49 L. ed. 1123.

[28] Farrell v. Lockhart, 210 U. S. 142, 146, 28 Sup. Ct. Rep. 681, 52 L. ed. 994, 16 L. R. A., N. S., 162; Swanson v. Sears, 224 U. S. 180, 32 Sup. Ct. Rep. 455, 56 L. ed. 721. For comment on Helena-Baggaley case see Bergquist v. West Virginia W. Copper Co., 18 Wyo. 234, 106 Pac. 673, 683.

[29] See cases cited in preceding notes.

completion of a location; therefore, as to these states this article is inapplicable.

The states and territories hereinafter enumerated, however, have supplemented federal legislation by requiring that certain preliminary development work in the nature of a discovery shaft, or its equivalent, shall be performed within a specified time as a condition precedent to the completion of a lode location. This legislation has been held to be valid.[30]

As these state statutes are frequently important factors necessary to be considered in construing and applying decisions of the state courts, we will present an outline of the provisions found in the several states and territories upon this subject, taking the state of Colorado as a basis of comparison.

Colorado.—The laws of Colorado require the filing for record of a location certificate within three months from the date of discovery.[31]

Prior to the expiration of this time, and within sixty days from the time of uncovering or disclosing the lode,[32] the discoverer must sink a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of the shaft at the surface, or deeper if necessary, to show a well-defined crevice.[33]

30 *Ante,* § 250 (15); Northmore v. Simmons, 97 Fed. 386, 387, 38 C. C. A. 211, 20 Morr. Min. Rep. 128; Sissons v. Sommers, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829, 830; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1039, 19 Morr. Min. Rep. 650; Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153, 154; Butte Consol. M. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 303, 90 Pac. 177. And see Erhardt v. Boaro, 113 U. S. 527, 535, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472; Lockhart v. Johnson, 181 U. S. 516, 526, 21 Sup. Ct. Rep. 665, 45 L. ed. 979. But see Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 958, 20 Morr. Min. Rep. 591.

31 Mills' Annot. Stats., § 3150; Rev. Stats. 1908, § 4194.

32 Mills' Annot. Stats., § 3155; Rev. Stats. 1908, § 4200.

33 Mills' Annot. Stats., § 3152; Rev. Stats. 1908, § 4197.

The word "crevice," as here used, clearly means a mineral-bearing vein.[34]

The discovery of some other vein within the limits of the claim cannot supply the absence of the one required to be exposed in the discovery shaft.[35]

Any open cut, crosscut, or tunnel which shall cut a lode at the depth of ten feet below the surface, or an adit of at least ten feet in, along the lode from the point where the lode may be in any manner discovered, is equivalent to the discovery shaft.[36]

This statute is held to be mandatory, and unless complied with, the ground is subject to relocation.[37]

Arizona.—Within ninety days from the date of discovering the lode and posting notice thereon,[38] a discovery shaft must be sunk within the premises claimed to a depth of at least eight feet from the lowest rim of

[34] Bryan v. McCaig, 10 Colo. 309, 15 Pac. 413, 415; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 958, 20 Morr. Min. Rep. 591; Van Zandt v. Argentine M. Co., 8 Fed. 725, 728, 2 McCrary, 159, 4 Morr. Min. Rep. 441; Terrible M. Co. v. Argentine M. Co., 89 Fed. 583; Cheeseman v. Shreeve, 40 Fed. 787, 789, 17 Morr. Min. Rep. 260.

[35] Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 958, 20 Morr. Min. Rep. 591. In the case of Treasury Tunnel M. & R. Co. v. Boss, 32 Colo. 27, 105 Am. St. Rep. 60, 74 Pac. 888, a discovery was made, notice posted and discovery work done within the limits of a prior patented claim and notice was recorded. Subsequently, a valid discovery was made within the limits of the claim outside of the patented conflicting area, and discovery work done at the new point of discovery. Thereafter the ground or part of it was covered by a subsequent relocation of another claim, and it was contended that the relocation should prevail by reason of the failure to post and record a second notice. The court held that the subsequent discovery and performance of work validated the claim as against the later relocation, although there was neither posting or recording of a second notice. See Bergquist v. West Virginia & W. Copper Co., 18 Wyo. 234, 106 Pac. 673, 677.

[36] Mills' Annot. Stats., § 3154; Rev. Stats. 1908, § 4199.

[37] Walsh v. Henry, 38 Colo. 393, 88 Pac. 449, 450.

[38] Laws 1895, p. 54, § 6; Rev. Stats. 1901, § 3234; Amd. Laws 1909, p. 157.

such shaft at the surface, and deeper if necessary, until there is disclosed in said shaft mineral in place.[39]

Any open cut, adit, or tunnel which shall be made as above provided, as a part of the location, and which shall be equal in amount of work to a shaft eight feet deep and four feet wide by six feet long, and which shall cut a lode or mineral in place at the depth of eight feet from the surface, is equivalent as discovery work to a shaft sunk from the surface.[40]

Idaho.—The locator must complete his location by marking his boundaries within ten days from the date of discovery.[41]

Within sixty days from the date of location, the locator must sink a shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, and of not less than sixteen square feet in area. Any excavation which shall cut such vein ten feet from the lowest part of the rim of such shaft, and which shall measure one hundred and sixty cubic feet in extent, shall be considered a compliance with this provision.[42]

Montana.—After discovery, the initial step in the series of acts culminating in a completed location is the posting of a notice.[43]

Before the expiration of sixty days from the date of such posting, the locator must sink a discovery shaft to the same depth as required by the laws of Colorado, except that to the words "well-defined crevice" is added "or valuable deposit." The equivalent of such

[39] Rev. Stats. 1901, § 3234; Amd. Laws 1909, p. 157.

[40] Rev. Stats. 1901, § 3237; Amd. Laws 1909, p. 157.

[41] Rev. Stats., § 3101, as amended—Laws 1895, p. 26; as amended—Laws 1899, p. 633; Civ. Code 1901, § 2557; Rev. Code 1907, § 3207.

[42] Stats. 1895, p. 27, § 3; Civ. Code 1901, § 2558; Rev. Code 1907, § 3208.

[43] Pol. Code, § 3610; Rev. Codes 1907, § 2283.

shaft is the same as in Colorado.[44] This requirement has been held to be valid and mandatory.[45]

Nevada.—The posting of a notice is required, and before the expiration of ninety days thereafter the locator must sink a discovery shaft to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show by such work a lode deposit of mineral in place. A cut, crosscut, or tunnel which cuts the lode at a depth of ten feet, or an open cut along the ledge or lode equivalent in size to a shaft four feet by six feet by ten feet deep is equivalent to a discovery shaft.[46]

This legislation has been held to be valid.[47]

New Mexico.—Within ninety days from the time of taking possession,[48] and prior to recording the notice of location (three months after posting), the locator must sink a discovery shaft upon the claim to the

[44] Pol. Code, § 3611; as amended—Laws 1901, p. 140, § 1; Rev. Codes 1907, § 2284.

[45] Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153, 154. See, also, Baker v. Butte City Water Co., 28 Mont. 222, 104 Am. St. Rep. 683, 72 Pac. 617, 618; Butte City Water Co. v. Baker, 196 U. S. 119, 127, 25 Sup. Ct. Rep. 211, 49 L. ed. 409; McMillan v. Ferrum M. Co., 32 Colo. 38, 105 Am. St. Rep. 64, 74 Pac. 461, 463; S. C., on writ of error, 197 U. S. 343, 25 Sup. Ct. Rep. 533, 49 L. ed. 784; Mares v. Dillon, 30 Mont. 117, 75 Pac. 963, 964; Dolan v. Passmore, 34 Mont. 277, 85 Pac. 1034, 1035; Helena Gold & Iron Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455; Butte Northern Copper Co. v. Radmilovich, 39 Mont. 157, 101 Pac. 1078, 1080.

[46] Comp. Laws 1900, § 209; as amended—Stats. 1901, p. 97; Stats. 1907, p. 418; Rev. Laws 1912, § 2423.

[47] Sissons v. Sommers, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829, 830.

[48] There is nothing in the statutes of New Mexico fixing the time within which *possession* is to be taken, or defining what constitutes such possession. A notice is required to be posted, and within three months to be recorded. The posting of this notice is probably "taking possession." Erhardt v. Boaro, 8 Fed. 692, 693, 2 McCrary, 141, 4 Morr. Min. Rep. 432.

depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or must drive a tunnel, open cut, or adit upon such claim, exposing mineral in place at least ten feet below the surface.[49]

North Dakota.—The locator must record a location certificate within sixty days from the date of discovery,[50] and before filing such certificate for record, must sink a discovery shaft on the claim sufficient to show a well-defined mineral vein or lode.[51]

There is also a provision granting the locator sixty days from the time of uncovering or disclosing the lode in which to sink such shaft.[52] The statute is evidently drawn on the lines of the Colorado law, with this marked distinction: In Colorado the shaft must be sunk within *three months* from the date of the discovery, and within sixty days from uncovering or disclosing the lode, suggesting that the locator might have thirty days after discovery to uncover or disclose his lode. In North Dakota the time is fixed at sixty days from date of discovery (i. e., before recording the notice), and sixty days from uncovering or disclosing the lode. To give the statute effect in all its parts, the uncovering or disclosing the lode must be construed as meaning the *discovery*. If this be not true, then the locator might have an indefinite time in which to uncover and disclose his lode.

If a discovery should be made on January 1st, the certificate must be recorded on or before March 2d. If the lode is not uncovered or disclosed until the 5th of January, unless the construction we place upon the law is correct, the locator would have until March 8th to sink his shaft, rendering nugatory the requirement

49 Laws 1889, p. 42; Comp. Laws 1897, § 2298.

50 Rev. Pol. Code 1895, § 1428; Id. 1899, § 1428; Id. 1905, § 1802.

51 Rev. Pol. Code, 1895, § 1430; Id. 1899, § 1430; Id. 1905, § 1804.

52 Rev. Pol. Code 1895, § 1433; Id. 1905, § 1807.

that he should perform this development work before the certificate is recorded. It would therefore seem that the provision allowing sixty days from the uncovering of the lode in which to sink the shaft is inoperative unless that act is understood to mean the *discovery*.

Any open cut, crosscut, or tunnel, at a depth sufficient to disclose the mineral vein or lode, or an adit of at least ten feet along the lode from the point where the lode may be in any manner discovered, is equivalent in North Dakota to a discovery shaft.[53]

Oregon.—The locator is required to post a notice of discovery, and before the expiration of sixty days from the date of such posting, and before recording the notice of location, must sink a discovery shaft upon the claim located to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary, to show by such work a lode, or vein, of mineral deposit in place. A cut, crosscut, or tunnel which cuts the lode at a depth of ten feet, or an open cut at least six feet deep, four feet wide, and ten feet in length along the lode, from a point where the same may be in any manner discovered, is equivalent to such discovery shaft. It is provided that such work shall not be deemed a part of the assessment work required by the Revised Statutes of the United States. An affidavit showing compliance with the foregoing provisions is required to be made and attached to the notice of location and recorded therewith.[54]

South Dakota.—The laws upon this subject in South Dakota are the same as in North Dakota, with the ex-

[53] Rev. Pol. Code, § 1432; Id. 1899, § 1432; Id. 1905, § 1806.

[54] Laws 1898, p. 17, as amended—Laws 1901, p. 141; Bellinger & Cotton's Codes, § 3977; Lord's Or. Laws, § 5130.

ception that the discovery shaft must not be less than ten feet in depth on the lower side, and the open cut, to be equivalent to a discovery shaft, is required to be of at least ten feet face.[55]

Washington.—The discoverer is required within ninety days from the date of discovery to record a location notice. Before filing the same for record he must sink a discovery shaft upon the lode to the depth of ten feet from the lowest part of the rim of such shaft at the surface. Any open cut or tunnel having a length of ten feet, which shall cut a lode at the depth of ten feet below the surface, shall hold the lode the same as if a discovery shaft were sunk thereon, and shall be equivalent thereto.[56]

These provisions do not apply to claims lying west of the summit of the Cascade mountains.

Wyoming.—The locator is required to sink a shaft upon the discovered lode or fissure to the depth of ten feet from the lowest rim of the shaft at the surface within sixty days from the date of discovery.[57]

Any open cut which shall cut the vein ten feet in length, and with face ten feet in height, or any crosscut tunnel, or tunnel on the vein, ten feet in length which shall cut the vein ten feet below the surface, measured from the bottom of such tunnel, is considered the equivalent of a discovery shaft.[58]

[55] Comp. Laws Dak. 1887, § 1999; Grantham's Ann. Stats. (1899), § 2658, as amended—Laws 1899, p. 146, §§ 2659, 2660, 2662, 2663; Pol. Code 1903, § 2538.

[56] Laws 1899, p. 69; Rem. & Bal. Code, § 7359.

[57] Laws 1888, p. 88, § 17; Id., § 19, as amended—Laws 1890, p. 180; Laws 1895, ch. 108, § 2; Rev. Stats. 1899, §§ 2548, 2550; Comp. Stats. 1910, §§ 3469, 3471.

[58] Laws 1888, p. 88, § 18; Rev. Stats. 1899, § 2549; Comp. Stats. 1910, § 3470.

§ 344. **Object of requirement as to development work.**—The object of this class of legislation is twofold:—

(1) To demonstrate to a reasonable degree of certainty that the deposit sought to be located as a lode is in fact a vein of quartz or other rock in place;

(2) To compel the discoverer to manifest his intention to claim the ground in good faith under the mining laws.[59]

The supreme court of Montana, speaking of the law of that state, says that one of the purposes of this class of legislation was

> To do away with a practice which has prevailed prior to the enactment of the code whereby one person with little labor could make a number of locations in the same locality and thus withdraw from exploration by other prospectors a large area of the public land. It was deemed unwise that the practice should prevail, and hence the requirement that substantial work should be done before the notice of location could be filed, and that the notice should show that such work in fact had been done; and though the posts and other markings might disappear, the excavations upon the ground would remain, and they should be of such character as to meet the requirements of the statute and effectuate its purpose.[60]

The Colorado act, which is the parent of all the others, was passed in 1874, about the time of the discovery of the blanket carbonate deposits in the Leadville regions. In these localities, the vein exposures,

[59] Text quoted and approved, Butte Consol. M. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 303, 90 Pac. 177; Nichols v. Williams, 38 Mont. 552, 100 Pac. 969, 970.

[60] Helena Gold & Iron Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455, 457.

such as answered the popular definition of outcrop, were few, along the sides of eroded gulches, and the underlying beds were in the main reached by vertical shafts sunk from the surface through the overlying "slide" and white porphyry to the contact with the blue limestone, where the ore bodies, in certain geological horizons, were usually encountered. In many of these cases there was no real discovery from the surface. The miner's "indications" consisted of the development of work of his neighbors and the generally accepted geological theories.

The vertical depth from the surface to the deposits varied in different localities, so the law required the shaft to be sunk to a sufficient depth to show a well-defined crevice. These local conditions, if they were not the moving cause of the enactment, certainly proved its wisdom.

On the other hand, in the absence of this class of state legislation, alleged discoveries may be made, and after marking boundaries, the locator is allowed a year from the first day of January next succeeding the date of his location within which to do one hundred dollars' worth of work. Until that time elapses, he is not called upon to do anything. In many instances he does no work until compelled to, and about the time the period elapses, he "resumes" work which he never commenced, and each succeeding first day of January finds him again in a state of "resumption." During this period, in a large number of cases which have come under our personal observation, the location is a threat, preventing others who might be willing to develop the ground from acquiring rights. The requirement that some genuine development work should be done as a condition precedent to the perfection of a lode location is wise and beneficial, and the courts uniformly enforce

the law—not with rigid strictness, but with fairness and liberality. In our judgment, this class of state legislation was contemplated by congress when it enacted the mining laws. Where such laws have been passed upon by the courts, their validity has been upheld.[61]

Work required by this class of statutes to be done should be done from the surface. Secret underground works extending from shafts in other claims accessible only to the locator will not satisfy the law.[62]

The time limit fixed in these statutes would seem to be mandatory. A discoverer could not extend it by simply renewing notices or changing dates on the old notices, as against one making a location after the statutory period following the original discovery and notice had expired.[63]

61 Sissons v. Sommers, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829, 830; Northmore v. Simmons, 97 Fed. 386, 388, 38 C. C. A. 211, 20 Morr. Min. Rep. 128; Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153, 154. See Erhardt v. Boaro, 113 U. S. 527, 535, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472, and Lockhart v. Johnson, 181 U. S. 516, 526, 21 Sup. Ct. Rep. 665, 45 L. ed. 979. But see Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 958, 20 Morr. Min. Rep. 591; Baker v. Butte City Water Co., 28 Mont. 222, 104 Am. St. Rep. 683, 72 Pac. 617, 618; Butte City Water Co. v. Baker, 196 U. S. 119, 125, 25 Sup. Ct. Rep. 211, 49 L. ed. 409; McMillen v. Ferruno Min. Co., 32 Colo. 38, 105 Am. St. Rep. 64, 74 Pac. 461; S. C., in error dismissed, 197 U. S. 343, 25 Sup. Ct. Rep. 533, 49 L. ed. 784; Treasury Tunnel M. & R. Co. v. Boss, 32 Colo. 27, 105 Am. St. Rep. 60, 74 Pac. 838, 889; Mares v. Dillon, 30 Mont. 117, 75 Pac. 963; Dolan v. Passmore, 34 Mont. 277, 85 Pac. 1034, 1035; Helena Gold & Iron Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455, 457; Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 303, 90 Pac. 177.

62 Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 303; S. C., on rehearing, (Mont.) 90 Pac. 177, 178, criticising what was said in Brewster v. Shoemaker, 28 Colo. 176, 89 Am. St. Rep. 188, 63 Pac. 309, 310, 53 L. R. A. 793, 21 Morr. Min. Rep. 155. See, also, Nichols v. Williams, 38 Mont. 552, 100 Pac. 969, 970, differentiating the Butte consolidated case.

63 Ingemarson v. Coffey, 41 Colo. 407, 92 Pac. 908, 909.

§ 345. Relationship of the discovery to the discovery shaft.—As Mr. Morrison in his "Mining Rights" tersely states,[64] "the fact of discovery is a fact of itself, to be totally disconnected from the idea of discovery shaft. The discovery shaft is a part of the process of location subsequent to discovery."[65]

When we speak of the discovery shaft, we mean to include in that term the various equivalents provided for by the several state enactments, as hereinbefore outlined.[66]

As heretofore demonstrated, the discovery must be within the limits of the location as ultimately defined, and upon land that is free and open to exploration.[67] The same rule applies to the discovery shaft.[68] But it is not required that the development work shall be performed at the point where the first discovery is made;[69] neither is it required that the discovery shaft should be equidistant from the end-lines.[70] The locator may make any shaft he may sink his discovery shaft,[71] provided always, that he discloses within it some well-defined crevice or mineral "in place." Such a disclosure in the discovery shaft is necessary, and

64 14th ed., p. 37.

65 Quoted in Brewster v. Shoemaker, 28 Colo. 176, 89 Am. St. Rep. 188, 63 Pac. 309, 310, 53 L. R. A. 793, 21 Morr. Min. Rep. 155.

66 Brewster v. Shoemaker, 28 Colo. 176, 89 Am. St. Rep. 188, 63 Pac. 309, 310, 53 L. R. A. 793, 21 Morr. Min. Rep. 155.

67 *Ante*, § 337.

68 Armstrong v. Lower, 6 Colo. 393; Upton v. Larkin, 5 Mont. 600, 6 Pac. 66, 67; Morr. Min. Rights, 14th ed., p. 49.

69 Butte Northern Copper Co. v. Radmilovich, 39 Mont. 157, 101 Pac. 1078, 1080.

70 Taylor v. Parenteau, 23 Colo. 368, 48 Pac. 505, 507, 18 Morr. Min. Rep. 534.

71 Charge of Judge Hallett in Terrible M. Co. v. Argentine M. Co., as outlined in Argentine M. Co. v. Terrible M. Co., 122 U. S. 478, 481, 7 Sup. Ct. Rep. 1356, 30 L. ed. 1140, 17 Morr. Min. Rep. 109. This charge is reported in 5 McCrary, 639, 89 Fed. 583.

the mere discovery of some other vein within the limits of the claim cannot supply the absence of the one required to be exposed in the discovery shaft,[72] particularly where other rights have intervened.[73] In the absence of intervening rights the locator may exercise the privilege of performing his discovery work at some point within the claim other than the one first selected.[74] The first discovery may not always indicate to the miner the appropriate place where economic considerations require his development work to be done.[75] For the purpose of enabling him to determine these facts and select his place, the state laws grant him fixed periods within which to make his selection and complete his location, with the necessary condition attached, that if he fails to disclose his vein at or below the depth required by the local laws, and within the specified period, his ground will become subject to relocation by the next comer.

His original discovery will protect him in his possession during the statutory period,[76] but if he permits that period to elapse, and fails to perform his development work and accomplish the results contemplated by law, his possession must yield to the next comer who

[72] Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 958, 20 Morr. Min. Rep. 591; Fleming v. Daly, 12 Colo. App. 439, 55 Pac. 946, 949.

[73] McMillen v. Ferrum M. Co., 32 Colo. 38, 105 Am. St. Rep. 64, 74 Pac. 461, 463; writ of error dismissed, 197 U. S. 343, 25 Sup. Ct. Rep. 533, 49 L. ed. 784.

[74] Treasury Tunnel M. & R. Co. v. Boss, 32 Colo. 27, 105 Am. St. Rep. 60, 74 Pac. 888, 889.

[75] Harrington v. Chambers, 3 Utah, 94, 1 Pac. 362, 375.

[76] Erhardt v. Boaro, 113 U. S. 527, 534, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472; Marshall v. Harney Peak Tin Co., 1 S. D. 350, 47 N. W. 290, 294; Omar v. Soper, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443, 446, 15 Morr. Min. Rep. 496.

succeeds by peaceable methods in initiating a right.[77] As is said by Mr. Morrison, the neglect of the locator to comply with this requirement is equivalent to an abandonment of the inchoate right given by discovery.[78] The discovery has performed its office. The perfected location rests ultimately on the completed development work. This we understand to be the rule announced by Judge Hallett in the Adelaide-Camp Bird case,[79] and we are not aware of any adjudicated case to the contrary. It is true that the supreme court of Utah[80] and the United States circuit court, ninth circuit, district of California,[81] have announced that it is not necessary that the locator should show the existence of a vein in any particular place, provided it is shown to exist in some portion of the claim; but it must be borne in mind that neither the laws of Utah nor California require the performance of development work as a prerequisite to a perfected location,[82] and in the absence of such local legislation it is not required.

An original discovery may be made in the discovery shaft, even after a location has been perfected, and this will be sufficient in the absence of intervening rights.[83]

77 Lockhart v. Johnson, 181 U. S. 516, 527, 21 Sup. Ct. Rep. 665, 45 L. ed. 979.

78 Morr. Min. Rights, 14th ed., p. 37.

79 Van Zandt v. Argentine M. Co., 8 Fed. 725, 728, 2 McCrary, 159, 4 Morr. Min. Rep. 441.

80 Harrington v. Chambers, 3 Utah, 94, 1 Pac. 362, 376.

81 North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 1 Fed. 522, 531, 9 Morr. Min. Rep. 529.

82 *Ante*, § 343.

83 Strepey v. Stark, 7 Colo. 619, 5 Pac. 111, 115, 17 Morr. Min. Rep. 28; Zollars & H. C. C. M. Co. v. Evans, 2 McCrary, 39, 5 Fed. 172, 175, 4 Morr. Min. Rep. 407. See Treasury Tunnel M. & R. Co. v. Boss, 32 Cal. 27, 105 Am. St. Rep. 60, 74 Pac. 888, 889. The fact that the discovery shaft is partly on one claim and partly on another is held to be unimportant (Phillips v. Brill, 17 Wyo. 26, 95 Pac. 856, 859), provided

§ 346. **Extent of development work.**—In the state of North Dakota the requirements of the law are satisfied when the discovery shaft or opening shows a well-defined mineral vein, or lode, regardless of the vertical distance from the surface at which it is disclosed. The other precious metal-bearing states[84] require a certain depth in case of the shaft, and length in case of other openings, and this requirement must be fulfilled, although the vein is disclosed before reaching the required distance, thus giving sanction to the view hereinbefore expressed, that the object of requiring development work was twofold.[85]

For example, the discovery shaft must be at least ten feet deep. It must be deeper if, at the required vertical distance from the lowest rim, the vein or crevice be not disclosed. It is hardly profitable to discuss the consequences flowing from a failure to strictly comply with the requirements as to depth if the proper vein exposure is found within the required distance. Prudent miners will not jeopardize valuable rights by failing to comply fully with the law, and courts will readily detect a manifest attempt at evasion.

The requirement as to disclosing the vein, crevice, or deposit in place, which terms are legal equivalents, is

the part within the claim for which the work is ostensibly done is of sufficient size for ordinary purposes of access. Nichols v. Williams, 38 Mont. 552, 100 Pac. 969, 970. Work must be done from the surface, and not through underground works in other claims. Butte Consol. M. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 303, 90 Pac. 177. The contrary inference which may be drawn from the opinion in Brewster v. Shoemaker, 28 Colo. 176, 89 Am. St. Rep. 188, 53 L. R. A. 793, 63 Pac. 309, 310, 21 Morr. Min. Rep. 155, is held to be either *obiter* or wrong. Butte Consol. M. Co. v. Barker (on rehearing), 35 Mont. 327, 90 Pac. 177, 178.

[84] Colorado, Arizona, Idaho, Montana, Nevada, New Mexico, Oregon, South Dakota, Washington, and Wyoming.

[85] *Ante*, § 344.

unquestionably mandatory. What constitutes such a vein is to be determined by the rules announced by the courts in the adjudicated cases, which have been fully presented in preceding articles,[86] and need not here be repeated.

A former statute of Montana required the discovery shaft to disclose at least one wall of the vein,[87] but this has since been repealed. It has been decided in Colorado that the requirements of the discovery-shaft laws do not involve the uncovering of the walls. When the shaft is sunk to the necessary depth on the vein, the statutory condition in that respect is fulfilled. When a given formation is determined to be a lode, the walls or at least lode boundaries are a geological necessity. Their existence is as certain as that of the vein.[88]

In construing the provisions of the Colorado statute providing for development by adit, which in mining parlance is an opening on and along the vein used for drainage, the supreme court of Colorado has held that it was the legislative intention to substitute horizontal development in and along the lode for ten feet, in lieu of a discovery shaft of that depth, and that the distance below the surface at which the vein appeared in place as the result of this class of development was immaterial.[89]

The same court also determined that an "adit" need not be altogether under cover.[90]

[86] *Ante*, §§ 286–301.

[87] Foote v. National M. Co., 2 Mont. 402; O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. 302.

[88] Fleming v. Daly, 12 Colo. App. 439, 55 Pac. 946, 949.

[89] Gray v. Truby, 6 Colo. 278; Craig v. Thompson, 10 Colo. 517, 526, 16 Pac. 24, 29; Brewster v. Shoemaker, 28 Colo. 176, 89 Am. St. Rep. 188, 63 Pac. 309, 53 L. R. A. 793, 21 Morr. Min. Rep. 155.

[90] Electro-Magnetic M. & D. Co. v. Van Auken, 9 Colo. 204, 11 Pac. 80, 81; Craig v. Thompson, 10 Colo. 517, 526, 16 Pac. 24, 29.

Article V. The Preliminary Notice and Its Posting.

§ 350. Local customs as to preliminary notice, and its posting prior to enactment of federal laws—Not required by congressional law.
§ 351. State legislation requiring the posting of notices—States grouped.
§ 352. First group.
§ 353. Second group.
§ 354. Third group.
§ 355. Liberal rules of construction applied to notices.
§ 356. Place and manner of posting.

§ 350. Local customs as to preliminary notice, and its posting prior to enactment of federal laws—Not required by congressional law.—During the period when mining privileges upon the public domain were governed exclusively by the local regulations and customs of miners, the first step in the inception of the miner's right, after the discovery, was the posting of a notice at some point on, or in reasonable proximity to, the discovered lode, usually upon a tree, stake, or mound of rocks.[91] The posting of this notice served to manifest the intention of the discoverer to claim the vein to the extent described, and to warn all others seeking new discoveries that there was a prior appropriation of the lode to which the posted notice applied.[92]

These notices were of the simplest character, were required to be in no particular form, and were generally prepared by unlettered men. They served the purpose, however, and enabled anyone seeking in good faith to locate claims to ascertain the extent and nature

[91] Yale on Mining Claims and Water Rights, p. 78; J. Ross Browne's Mineral Resources, 1867, pp. 236–242; Gleeson v. Martin White M. Co., 13 Nev. 450.

[92] Yosemite M. Co. v. Emerson, 208 U. S. 25, 31, 28 Sup. Ct. Rep. 196, 52 L. ed. 374.

of the right asserted on the particular lode by the prior discoverer.

During this period, it will be remembered, as well as during the period immediately preceding the passage of the act of May 10, 1872, the lode was the principal thing sought, and the surface was a mere incident.[93] The locator could hold but one vein,[94] and while surface boundaries were eventually in some way defined, neither the form nor extent of such surface, prior to filing the diagram for patent, controlled the rights on the located lode.[95]

While the act of 1872 changed all this,[96] and required the marking of surface limits inclosing the located lode, it did not dispense with the necessity of posting the preliminary notice, when such was required by state or district rules, nor destroy its usefulness in the absence of any such regulations. While, in the absence of state legislation or district regulations, the posting of a notice on the claim is not required at any stage of the proceedings culminating in the completion of the location,[97] the prospector's first im-

[93] *Ante*, § 58; Johnson v. Parks, 10 Cal. 447, 449; Patterson v. Hitchcock, 3 Colo. 533, 544; Wolfley v. Lebanon M. Co., 4 Colo. 112; Walrath v. Champion M. Co., 63 Fed. 552, 556; Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 63, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[94] Eureka Case, 4 Saw. 302, 323, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578; Eclipse G. & S. M. Co. v. Spring, 59 Cal. 304.

[95] *Ante*, § 58.

[96] *Ante*, §§ 70, 71.

[97] Haws v. Victoria C. M. Co., 160 U. S. 303, 317, 16 Sup. Ct. Rep. 282, 40 L. ed. 436; Gird v. California Oil Co., 60 Fed. 531, 536, 18 Morr. Min. Rep. 45; Book v. Justice M. Co., 58 Fed. 106, 115, 17 Morr. Min. Rep. 617; Allen v. Dunlap, 24 Or. 229, 33 Pac. 675; Carter v. Bacigalupi, 83 Cal. 187, 192, 23 Pac. 361, 363; Meydenbauer v. Stevens, 78 Fed. 787, 791, 18 Morr. Min. Rep. 578; Willeford v. Bell (Cal.), 49 Pac. 67; Perigo v. Erwin, 85 Fed. 904, 906, 19 Morr. Min. Rep. 269. But see Adams v. Crawford, 116 Cal. 495, 498, 48 Pac. 488, 489; Dwinnell

pulse upon discovering a lode is to post his notice. While his failure to so do, where the state law or local custom does not require it, is accompanied with no deprivation of right, yet it may be safely said that the practice of posting a notice of this character is almost universal.

§ 351. State legislation requiring the posting of notices—States grouped.—In the Territory of Alaska there is no law of congress on the subject of posting notices. The matter is governed by local regulations and customs, and posting is as a rule required. Practically all of the precious metal-bearing states subject to the federal mining laws require the posting of a notice of location.

For the purpose of disclosing the nature of such legislation, we may group the states into three classes:—

(1) Those requiring a preliminary notice which has no reference to the recorded certificate of location;

(2) Those wherein the posted notice bears a direct relation to the recorded certificate;

(3) Those requiring two different notices to be posted—one a preliminary, or discovery notice, the other conforming to the certificate which must ultimately be recorded.

§ 352. First group.—

Colorado requires to be posted at the point of discovery on the surface a plain sign, or notice, contain-

v. Dyer, 145 Cal. 12, 78 Pac. 247, 253, 7 L. R. A., N. S., 763; Anderson v. Caughey, 3 Cal. App. 22, 84 Pac. 223, 224; Daggett v. Yreka M. &. M. Co., 149 Cal. 357, 86 Pac. 968, 969; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 218, 60 C. C. A. 155, 22 Morr. Min. Rep. 688; Sturtevant v. Vogel, 167 Fed. 448, 454, 93 C. C. A. 84; Saxton v. Perry, 47 Colo. 263, 107 Pac. 281, 283.

ing: (1) the name of the lode; (2) the name of the locator; (3) the date of discovery. This posting must precede the recording of the certificate of location, but otherwise the posted notice is wholly disconnected from the recorded instrument.[98]

Montana.—The Montana law adds to the requirements of the Colorado law: (4) the number of linear feet each way from the point of discovery; (4a) the width on each side of the center of the vein; (4b) the general course of the vein.[99] Nothing is said as to when the notice shall be posted, but the inference is that it should be done at the time of the discovery.[100]

Nevada.—The requirements in this state are the same as those of Montana.[1]

North Dakota[2] and *South Dakota*[3] add to the Colorado requirements: (4) the number of feet claimed in length on either side of the discovery; (5) number of feet in width on either side of the lode.

Washington.—The contents of the notice required in Washington are the same as those in Colorado.[4]

98 Mills' Annot. Stats., § 3152; Rev. Stats. 1908, § 4197.

99 A mistake in this course, however, would not vitiate the location. Butte Northern Copper Co. v. Radmilovich, 39 Mont. 157, 101 Pac. 1078, 1080.

100 Rev. Pol. Code 1895, § 3610; Rev. Code 1907, § 2283. Validity upheld: Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153, 154; Baker v. Butte City Water Co., 28 Mont. 222, 104 Am. St. Rep. 683, 72 Pac. 617, 618; Butte City Water Co. v. Baker, 196 U. S. 119, 124, 25 Sup. Ct. Rep. 211, 49 L. ed. 409; Mares v. Dillon, 30 Mont. 117, 75 Pac. 963.

1 Comp. Laws 1900, § 208, amended 1907, p. 418; Rev. Laws 1912, § 2422.

2 Rev. Codes, § 1430, subd. 2; Id. 1899, § 1430; Id. 1905, § 1804.

3 Comp. Laws of Dakota, 1887, § 2001, adopted by South Dakota—Laws 1890–91, ch. cv, § 1; Grantham's Ann. Stats. S. D. (1899), § 2660, as amended—Laws 1899, p. 148; Rev. Pol. Code 1903, § 2537.

4 Laws 1899, p. 69; Ballinger's Supp. 1901–3, § 3151a; Rem. & Bal. Codes 1909, § 7358.

Wyoming.—The requirements in this state are the same as in Colorado, except that the name of the discoverer must also appear, suggesting that the locator and discoverer may be different persons.[5]

§ 353. Second group.—

Arizona requires the posting, at or contiguous to the point of discovery on the surface, of a location notice, which must contain: (1) name of claim; (2) name of locator; (3) date of location; (4) the length and width of the claim in feet, and the distance from the point of discovery to each end of the claim; (5) the general course of the claim; (6) locality of the claim with reference to natural monuments. A copy of the location notice must be recorded.[6]

California requires posting of notice at point of discovery which must contain: (1) the name of the lode or claim; (2) name of locator; (3) number of linear feet along the course of the vein each way from the point of discovery; (4) width on each side of the center of the claim; (5) general course of the vein as near as may be; (6) date of location; (7) description of the claim with reference to some natural object or permanent monument.[7] A true copy of the posted notice must be recorded within thirty days after posting.[8]

New Mexico provides for the posting, in some conspicuous place on the location, of a notice in writing, stating: (1) the names of the locators; (2) the intent to locate the claim; (3) a description by reference to

[5] Laws 1888, p. 88, § 17; Rev. Stats. 1899, § 2548; Comp. Stats. 1910, § 3469.

[6] Rev. Stats. 1901, § 3232. Statute commented on in Wiltsee v. King of Arizona M. & M. Co., 7 Ariz. 95, 60 Pac. 896.

[7] Civ. Code, § 1426.

[8] Civ. Code, § 1426b.

some natural object or permanent monument. A copy of this notice as posted must be recorded.[9]

Oregon requires the locator to post on the claim a notice of discovery and location, which shall contain: (1) name of the claim; (2) name of locator; (3) date of the location; (4) number of linear feet claimed along the vein or lode each way from the point of discovery, with the width on each side of the lode or vein; (5) the general course, or strike, of the vein, or lode, as nearly as may be, with reference to some natural object or permanent monument in the vicinity thereof. A copy of the notice so posted, together with an affidavit of sinking of the discovery shaft, must be recorded.[10]

Utah requires posting, at the place of discovery, of a notice of location, which shall contain: (1) the name of the lode or claim; (2) the name of the locator; (3) the date of location; (4) the number of linear feet claimed in length along the course of the vein, each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the vein, or lode, and such a description of the claim located by reference to some natural object or permanent monument, as will identify the claim. A substantial copy of such notice of location must be recorded.[11]

[9] Comp. Laws 1884, p. 754, § 1566; Id. 1897, § 2286. The posting of this notice must be practically contemporaneous with the discovery. No appreciable time is allowed. Deeney v. Mineral Creek M. Co., 11 N. M. 279, 67 Pac. 724, 725, 22 Morr. Min. Rep. 47; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 285.

[10] Laws 1898, p. 16, §§ 1, 2, as amended—Laws 1901, p. 140; Bellinger & Cotton's Code, § 3975; Lord's Or. Laws, § 5128.

[11] Comp. Laws 1907, § 1496.

§ 354. Third group.—

Idaho is the only state in this group. Its laws provide for the posting of two notices:—

(1) At the time of the discovery, when a monument must be erected at the place of discovery, upon which the locator must place his name, the date of discovery, and the distance claimed along the vein each way from such monument;

(2) At the time of marking his boundaries he must post another notice, the requirements of which are much more elaborate, and a substantial copy of which must be recorded.[12]

§ 355. Liberal rules of construction applied to notices.—The statutory requirements found in the first group of states, and the first requirement in the third group, are nothing more than the perpetuation of the system in vogue during the early history of the mining industry of the west.[13] They preserve the simplicity of the primitive system and recognize the fact that miners are unacquainted with legal forms, and usually are out of reach of legal assistance.[14] A sample of these preliminary notices may be found in the reports of any of the mining states. A case involving the following notice, arising under the statute of Colorado, heretofore referred to, reached the supreme court of the United States: "Hawk Lode.—We, the undersigned, claim fifteen hundred feet on this mineral-bearing lode, vein, or deposit,"—dated and signed

12 Laws 1895, p. 26, amending § 3101, Rev. Stats.; Laws 1899, p. 336, § 2, as amended—Laws 1899, p. 633; Civ. Code 1901, § 2557; Rev. Code 1907, § 3207.

13 Bergquist v. West Virginia-Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673, 679.

14 Carter v. Bacigalupi, 83 Cal. 187, 193, 23 Pac. 361, 363.

by the locators. It was contended, and the court below held, that the notice was insufficient because it failed to designate the number of feet on each side of the discovery point. The supreme court of the United States ruled, however, that as the law did not require the linear distances from the discovery monument to be stated, the notice and its posting was a valid appropriation of the lode to the extent of seven hundred and fifty feet on each side of the posted notice.[15] In construing these notices, both the courts and land department have been uniformly liberal. As was said by the supreme court of Utah,[16]—

> When the location was evidently made in good faith we are not disposed to hold the locator to a very strict compliance with respect to his location notice.[17]

As such notices are generally made by unlettered men, it would be productive of a great hardship if prospectors should be held to technical accuracy in their preparation. If they are sufficiently certain to put an honest inquirer in the way of ascertaining where the lode is, that is sufficient.[18]

[15] Erhardt v. Boaro, 113 U. S. 527, 533, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 871, 20 Morr. Min. Rep. 103.

[16] Farmington G. M. Co. v. Rhymney, 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832, 833.

[17] See, also, Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275; Butte Copper Co. v. Radmilovich, 39 Mont. 157, 101 Pac. 1078, 1080.

[18] Prince of Wales Lode, 2 Copp's L. O. 2; Carter v. Bacigalupi, 83 Cal. 187, 193, 23 Pac. 361, 363; Gird v. California Oil Co., 60 Fed. 531, 544, 18 Morr. Min. Rep. 45; Book v. Justice M. Co., 58 Fed. 106, 115, 17 Morr. Min. Rep. 617; Doe v. Waterloo M. Co., 70 Fed. 455, 458, 17 C. C. A. 190, 18 Morr. Min. Rep. 265; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1039, 19 Morr. Min. Rep. 650; Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300, 303; McCann v. McMillan, 129 Cal. 350, 62 Pac. 31, 33, 21 Morr. Min. Rep. 6;

When we deal with cases, however, arising under laws similar to those found in Arizona, California, New Mexico, Oregon, and Utah, and provisions like those of Idaho in reference to the second notice required by that state to be posted, we encounter a different element. Where the posted notice is the basis of the one to be ultimately recorded, the provisions of the federal law are operative, and the posted notice must contain the requirements of that law as to the contents of the record.[19]

> The distinction between the notice of discovery or notice of location required to be posted on the claim and the certificate or declaratory statement required to be filed for record is a substantial one, easily understood when the purpose of each is kept in mind.[20]

A notice might serve the purpose of a notice of discovery manifesting an intention to locate, and be wholly insufficient as a notice of perfected location which is to be recorded.[21]

In the absence of a state statute or local rule requiring it, the posted notice need not contain any reference to natural objects or permanent monuments, but the recorded notice must contain such description.[22]

Wells v. Davis, 22 Utah, 322, 62 Pac. 3, 4, 21 Morr. Min. Rep. 1; Walsh v. Erwin, 115 Fed. 531, 536; Bonanza Consol. v. Golden Head M. Co., 29 Utah, 159, 80 Pac. 736, 738; Zerres v. Vanina, 134 Fed. 610, 616; S. C., in error, 150 Fed. 564, 80 C. C. A. 366.

[19] Deeney v. Mineral Creek M. Co., 11 N. M. 279, 67 Pac. 724, 726, 22 Morr. Min. Rep. 47.

[20] Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1046, 19 Morr. Min. Rep. 650; Peters v. Tonopah M. Co., 120 Fed. 587, 589.

[21] Doe v. Waterloo M. Co., 70 Fed. 455, 458, 17 C. C. A. 190, 18 Morr. Min. Rep. 265; Gleeson v. Martin White M. Co., 13 Nev. 465; Gird v. California Oil Co., 60 Fed. 531, 536, 18 Morr. Min. Rep. 45; Peters v. Tonopah M. Co., 120 Fed. 587, 589.

[22] Brady v. Husby, 21 Nev. 453, 33 Pac. 801, 802; Poujade v. Ryan, 21 Nev. 449, 33 Pac. 659; Southern Cross M. Co. v. Europa M. Co., 15 Nev. 383.

Where a statute or local rule prescribes the form of a notice to be posted, and provides that a copy of such notice shall be recorded, if such notice does not contain the requirement of the federal and state [23] statutes it is an insufficient record. The supreme court of California has said that where district rules provide for the recording of a copy of a posted notice, such record is sufficient; [24] but this must not be understood as sanctioning a rule that the record of a posted notice is sufficient where such posted notice does not contain the facts required by section twenty-three hundred and twenty-four of the Revised Statutes providing for the contents of the record. Neither a local rule nor a state statute can dispense with the plain requirements of the federal law.[25]

§ 356. **Place and manner of posting.**—Most of the state laws requiring notices to be posted fix the point of discovery as the place of posting.[26] Naturally, this will be on the lode, or in such reasonable proximity as will identify it. In California, a local district custom required that a notice of location of a quartz claim should be in writing, "and posted conspicuously in a conspicuous place upon the claim located, at or near the lode line of said claim."

[23] Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153, 154; Baker v. Butte City Water Co., 28 Mont. 222, 104 Am. St. Rep. 683, 72 Pac. 617; Butte City Water Co. v. Baker, 196 U. S. 119, 127, 25 Sup. Ct. Rep. 211, 49 L. ed. 409; Hahn v. James, 29 Mont. 1, 73 Pac. 965; Dolan v. Passmore, 34 Mont. 277, 85 Pac. 1034; Helena Gold & Iron Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455.

[24] Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361.

[25] *Post*, §§ 389–392.

[26] The supreme court of Montana holds that a failure to regard this requirement vitiates the location as against an intervening right. Butte Northern Copper Co. v. Radmilovich, 39 Mont. 157, 101 Pac. 1078, 1080.

The supreme court of that state held that such a notice, written on one side of a sheet of paper which was folded with the writing inside and placed upon a mound of rocks three feet high, underneath two flat rocks, with a margin of the paper exposed to view, the rest being obscured by the two stones which covered it, was a conspicuous posting in a conspicuous place, and satisfied the rule.[27]

An artificial mound of rocks on the line of a lode is a conspicuous object which would naturally attract the attention of one seeking information as to a former location of a lode, and the slightest examination of the mound would result in the discovery of a written notice.

In another case in the same state, it was held that a written notice placed in a tin can, and the can placed in a mound of rocks, was sufficient posting.[28]

It is manifest that some precaution should be taken to protect the notice from destruction by exposure to wind and weather. While the law does not specifically require the locator of a claim to keep his notice up perpetually,[29] yet ordinary prudence suggests that it should be maintained and properly protected.

In the absence of any specific direction in the state statute or district regulation prescribing the manner of posting, any device adopted which would enable one seeking information in good faith to discover the exist-

[27] Donahue v. Meister, 88 Cal. 121, 22 Am. St. Rep. 283, 25 Pac. 1096, 1098.

[28] Gird v. California Oil Co., 60 Fed. 531, 544, 18 Morr. Min. Rep. 45.

[29] Nicholls v. Lewis & Clarke M. Co., 18 Idaho, 224, 109 Pac. 846, 850; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 217, 60 C. C. A. 155, 22 Morr. Min. Rep. 688.

ence of the notice should be sufficient.[30] The posting of such a notice after a *bona fide* discovery is an appropriation of the territory specified for the period allowed by local rules or state legislation for the performance of the remaining acts required to complete the location, and the appropriator is entitled during that period to be protected in his possession against all comers.[31]

Ordinarily we should say that the notice should be placed upon "free ground," that is, ground free from conflicts with other locations. At the same time, posting within the conflict area would not necessarily vitiate the location unless it was at the discovery point, in which case the entire location would fall.[32] An honest mistake in posting the notice and inadvertently placing it within the conflict area may be condoned, so long as the notice is posted within the limits of the *location* as claimed.[33]

[30] Gird v. California Oil Co., 60 Fed. 531, 544, 18 Morr. Min. Rep. 45; Bergquist v. West Virginia & Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673.

[31] *Ante*, § 339; Erhardt v. Boaro, 113 U. S. 527, 537, 5 Sup. Ct. Rep. 560, 565, 28 L. ed. 1113, 1116, 15 Morr. Min. Rep. 472, 477; Marshall v. Harney Peak Tin M. & M. Co., 1 S. D. 350, 47 N. W. 290; Omar v. Soper, 11 Colo. 380, 387, 7 Am. St. Rep. 246, 18 Pac. 443, 446, 15 Morr. Min. Rep. 496; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1041, 19 Morr. Min. Rep. 650; Iron Silver M. Co. v. Elgin, 118 U. S. 196, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98, 15 Morr. Min. Rep. 641.

[32] *Ante*, § 337.

[33] Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 285.

Article VI. The Surface Covered by the Location—Its Form and Relationship to the Located Lode.

§ 360. The ideal location.
§ 361. Surface area, length, and width of lode claims.
§ 362. Location covering excessive area.
§ 363. Surface conflicts with prior unpatented locations.
§ 363a. Surface conflicts with prior patented mining claims, millsites, and agricultural lands.
§ 364. Surface must include apex—Location on the dip.
§ 365. The end-lines.
§ 366. The side-lines.
§ 367. Side-end lines.

§ 360. The ideal location.—When we speak of an ideal location, we mean one which not only responds to all the requirements of the law, but one which confers upon its possessor the greatest possible property right, and conforms to the judicial theories of what constitutes the highest type of a perfected location. The ideal is rarely encountered in the practical mining world, but it furnishes a convenient standard with which the every-day location may be compared, enabling us to show to what extent a departure from the ideal diminishes the property rights which are susceptible of acquisition under a location of the highest possible type.

The ideal location must have for its basis an ideal lode, such a one as we have described and illustrated in a preceding section.[34] With this assumed, we should describe the highest type of a location as a rectangular parallelogram, the lines crossing the apex of the lode at right angles to the general course of the vein, termed in law the end-lines, the extremities of which are equidistant from the center of the vein, the

[34] *Ante*, § 309.

side-lines parallel to the course of the vein; that is, equidistant throughout from a line drawn through the center of the apex on its longitudinal course;[35] such a location as is represented in figure 11.[36] Without intending to enter into a discussion at this time of the extralateral right, we may say that this form of location confers upon the possessor the greatest property rights susceptible of being conveyed under the mining laws applicable to lode claims. It is to this standard that the various forms of locations on the surface which may come under discussion in the future will be compared.

§ 361. Surface area, length, and width of lode claims.—Prior to the passage of the act of July 26, 1866, the number and length of claims on a discovered lode, and the extent of surface ground which might be occupied and enjoyed therewith, was, like everything else connected with mining upon the public domain during that period, regulated by district rules or local customs. The act of 1866 fixed the limit of a single claim at two hundred feet in length along the vein, for each locator, except the discoverer, who was entitled to two claims. No person could make more than one location on the same lode, and not more than three thousand feet could be taken by any association of persons.[37]

As to width, this was left entirely to local regulations. When the claimant filed the diagram of his lode on application for patent, he was called upon to extend his claim laterally, so as to conform to the local

[35] Empire M. & M. Co. v. Tombstone M. & M. Co., 100 Fed. 910, 913, 20 Morr. Min. Rep. 443.

[36] *Ante*, § 309.

[37] 14 Stats. at Large, p. 252, § 4.

laws, customs, and rules of miners.[38] In some districts, the width was specified with reference to either the center of the vein or its inclosing walls. In others, the locator was allowed a reasonable quantity of surface. As the lode was the principal thing, and the surface a mere incident, neither the form nor extent of the surface area controlled the rights on the located lode.[39]

The act of May 10, 1872, which is incorporated into the Revised Statutes, changed this rule, giving to the surface boundaries a controlling importance.[40] It fixed the maximum length on the vein at fifteen hundred feet, and a maximum surface width of six hundred feet, three hundred feet on each side of the middle of the vein at the surface.[41]

State or district regulation may limit this width to a minimum of twenty-five feet on each side of the middle of the vein,[42] and we cannot see why the length of a claim may not likewise be limited by state or local rules within the maximum.[43]

Be that as it may, where state statutes deal with the subject at all they follow the lines of the federal law,[44] and no such limitation has ever been attempted by district regulations within our knowledge.

As to width, the maximum allowed by the federal law is the rule, except in a few localities. In Colorado,

38 Id., p. 252, § 2.

39 *Ante*, § 58.

40 *Ante*, § 71.

41 17 Stats. at Large, p. 91, § 2.

42 Rev. Stats., § 2320; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 305, 1 Fed. 522, 527, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 104, 11 Fed. 666, 673, 4 Morr. Min. Rep. 411; Copp's Min. Dec. 201; In re Taylor, 9 Copp's L. O. 52, 92.

43 Mr. Morrison, in his "Mining Rights" (14th ed., p. 22), doubts the power of the state to so limit the length, and assigns as a reason that it is a federal limitation.

44 *Ante*, § 250 (1).

the maximum width is one hundred and fifty feet on each side of the middle of the vein,[45] which rule obtains in North Dakota.[46]

The last-named state provides that any county at any general election may determine upon a greater width within the limitations of the federal laws.[47]

With the exceptions above noted, the customary surface area is therefore fifteen hundred by six hundred feet, embracing twenty and two-thirds acres. This may be called the unit of lode locations.

It is entirely immaterial how many or how few locators participate in this class of locations. The size of the "claim," or, more properly, the location, is not governed by the number of persons participating in its appropriation. There is nothing in the law which prevents any one locator or any set of locators from appropriating as many locations on the same lode as they may be able to find independent discoveries upon which to base them; congress has never yet seen proper to put a limit on the number of claims an individual, company or corporation may locate or acquire. Whether in view of its well-known policy to encourage the development of the mineral wealth of the country it shall deem it wise to do so rests with congress and is a matter with which the courts have nothing to do.[48]

[45] Stats. 1911, p. 515, amending Mills' Annot. Stats., § 3149; Gen. Stats. 1883, p. 722; Rev. Stats. 1908, § 4193.

[46] Rev. Code, 1895, § 1427; Id. 1899, § 1427; Id. 1905, § 1801.

[47] For many years Colorado had upon its statute books a similar law. It was repealed in 1911. Mr. Morrison informs us that no attempt was ever made by any county to change the width through an election. He doubts the constitutionality of the law. Morrison's Mining Rights, 14th ed., 25.

[48] Last Chance M. Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 579, 583, 66 C. C. A. 299; O'Connell v. Pinnacle Gold Mines Co., 131 Fed. 106, 109.

Oregon has a statute which permits the holding by one person of one claim only by location, and as many by purchase as the local rules of the district may permit.[49] We doubt if this is a matter which may be controlled by state legislation or local rules.[50]

§ 362. Location covering excessive area.—It frequently happens that the locator marking his surface without the aid of chain or compass includes within his boundaries an area in excess of the statutory limit.

The courts uniformly hold that such a location, where it injures no one at the time it is made, is not unreasonably excessive,[51] and where it has been made in good faith, is voidable only to the extent of the excess.[52]

[49] Hill's Ann. Laws 1892, § 3829; Bellinger & Cotton's Ann. Code, § 3974; Lord's Or. Laws, § 5127.

[50] The Philippine code limits the number to one. We shall observe later, when dealing with placer claims in Alaska, a limitation upon the number of claims an individual may locate.

[51] Nicholls v. Lewis & Clark M. Co., 18 Idaho, 224, 109 Pac. 846; Flynn Group M. Co. v. Murphy, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851, 1 Water & Min. Cas. 619.

[52] Rose v. Richmond M. Co., 17 Nev. 25, 27 Pac. 1105; Richmond M. Co. v. Rose, 114 U. S. 576, 580, 5 Sup. Ct. Rep. 1055, 29 L. ed. 273; Glacier Mt. S. M. Co. v. Willis, 127 U. S. 471, 481, 8 Sup. Ct. Rep. 1214, 32 L. ed. 172, 17 Morr. Min. Rep. 127; Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. 714, 715; Leggatt v. Stewart, 5 Mont. 107, 109, 2 Pac. 320, 321, 15 Morr. Min. Rep. 358; Lakin v. Dolly, 53 Fed. 333, 339; S. C., on appeal, 54 Fed. 461, 4 C. C. A. 438; Thompson v. Spray, 72 Cal. 528, 14 Pac. 182, 185; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 1 Fed. 522, 530, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 107, 11 Fed. 666, 670, 4 Morr. Min. Rep. 411; Atkins v. Hendree, 1 Idaho, 95; Burke v. McDonald, 2 Idaho, 646, 679, 33 Pac. 49, 50, 17 Morr. Min. Rep. 325; Stemwinder M. Co. v. Emma & L. C. M. Co., 2 Idaho, 421, 456, 21 Pac. 1040, 1042, affirmed on appeal to U. S. Sup. Ct., 149 U. S. 787, 13 Sup. Ct. Rep. 1052, 37 L. ed. 941; Hansen v. Fletcher, 10 Utah, 266, 37 Pac. 480, 482; Howeth v. Sullenger, 113 Cal. 547, 45 Pac. 841; Taylor v. Parenteau, 23 Colo. 368, 48 Pac. 505, 507, 18 Morr. Min. Rep. 534; Stephens

Upon application for patent, the monuments may be moved and the lines drawn in to cast off the excess.[53]

It is possible that a location may be so excessive that when considered with reference to topography, environment, the conduct of the locator and attendant circumstances, the presumption of fraudulent intent may arise and the entire location might be held void.[54]

Most excessive locations, however, are the result of inadvertence and innocent mistake.

Where a lode location is excessive, and the area to which a locator is entitled can be determined by measurements following the calls for distances from the discovery contained in the notice of location, it has been held that a subsequent locator may measure the ground, cast off and locate the excess.[55]

The notice of location, as a rule, specifies the linear distance claimed from the discovery point, and when

v. Wood, 39 Or. 441, 65 Pac. 602, 603, 21 Morr. Min. Rep. 443; Gohres v. Illinois & J. Gravel Co., 40 Or. 516, 67 Pac. 666, 667; McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823, 825; McPherson v. Julius, 17 S. D. 98, 95 N. W. 428; Walton v. Wild Goose M. Co., 123 Fed. 209, 217, 60 C. C. A. 155, 22 Morr. Min. Rep. 688; Zimmerman v. Funchion, 161 Fed. 859, 860, 89 C. C. A. 53, 1 Water & Min. Cas. 437; Waskey v. Hammer, 170 Fed. 31, 34, 95 C. C. A. 305; affirmed, 223 U. S. 85, 32 Sup. Ct. Rep. 187, 56 L. ed. 359; Jones v. Wild Goose M. & T. Co., 177 Fed. 95, 101 C. C. A. 349, 29 L. R. A., N. S., 392; Cordoner v. Stanley Cons. M. & M. Co., 193 Fed. 517, 518; Madeira v. Sonoma Magnesite Co., 20 Cal. App. 719, 130 Pac. 175, 178.

[53] In re Empey, 10 Copp's L. O. 102; Howeth v. Sullenger, 113 Cal. 547, 45 Pac. 841, 842. See Golden Reward M. Co. v. Buxton M. Co., 79 Fed. 868, 877; Credo M. & S. Co. v. Highland M. & M. Co., 95 Fed. 911, 916, where this rule was applied.

[54] Nicholls v. Lewis & Clark M. Co., 18 Idaho, 224, 109 Pac. 846, 848; Flynn Group Mining Co. v. Murphy, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851–854, 1 Water & Min. Cas. 619, and cases cited; Ledoux v. Forester, 94 Fed. 600.

[55] Atkins v. Hendree, 1 Idaho, 95, 100; McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823, 825; McPherson v. Julius, 17 S. D. 98, 95 N. W. 428, 434; Flynn Group M. Co. v. Murphy, 18 Idaho, 266, 138 Am. St.

it does not, the locator can only claim seven hundred and fifty feet along the vein on each side of the discovery notice.[56]

Obviously, this is the method which the courts would follow in casting off excess.

In the case of Flynn Group M. Co. v. Murphy,[57] it was contended that in case of an excessive lode location the locator was entitled to retain possession and himself determine where the excess should be cut off, and that until he exercised this privilege none of the area could be relocated. The court declined to approve this contention, and followed the rule permitting the relocator to make the measurements and relocate the resulting excess.

A somewhat different rule has been applied by the federal courts to excessive placer locations on unsurveyed lands in Alaska. As to such locations, it has been held that a locator of an excessive location has a right to select the part which is to be cast off,[58] and that until he has been made aware of the existence of such excess and has been afforded a reasonable time to exercise his right of selection, no relocation of any part of the ground will be permitted.[59]

Rep. 201, 109 Pac. 851, 854, 1 Water & Min. Cas. 619; Cardoner v. Stanley Cons. M. Co., 193 Fed. 517, 519.

[56] Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472.

[57] 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851, 854, 1 Water & Min. Cas. 619.

[58] McIntosh v. Price, 121 Fed. 716, 719, 58 C. C. A. 136; Zimmermann v. Funchion, 161 Fed. 859, 860, 89 C. C. A. 53, 1 Water & Min. Cas. 437; Waskey v. Hammer, 170 Fed. 31, 34, 95 C. C. A. 305, affirmed, 223 U. S. 85, 32 Sup. Ct. Rep. 187, 56 L. ed. 359; Jones v. Wild Goose M. & T. Co., 177 Fed. 95, 99.

[59] Zimmerman v. Funchion, 161 Fed. 859, 860, 89 C. C. A. 53, 1 Water & Min. Cas. 437; Jones v. Wild Goose M. & T. Co., 177 Fed. 95, 99.

In the cases cited in support of this rule, it appears that at the time of the attempted relocations, the original locators were in possession working the claim, and that a trespass was committed in attempting to invade such possession by including a part of the senior claim within the limits of the junior location. The *ratio decidendi* seems to rest on the well-recognized principle that no right to land on the public domain can be initiated by a trespass.[60]

The difference in the two rules, one applied to lode claims and the other to placers on unsurveyed lands, may be accounted for and upheld by reason of the difference in the character of the deposit, the manner and form of location, and the fact that in one class of locations there is furnished by the locator himself a guide which determines the manner in which the excess should be cast off, and in the other there is no such guide. Most of the excessive placer locations on unsurveyed lands arise from a faulty computation of superficial area. We shall have occasion to further discuss excessive placer locations.[61]

An excessive lode location which was not properly marked on the ground, and the notice of which failed to supply the information from which a second locator could make the measurements and determine the excess, would be void not necessarily because it was excessive, but for the reason that the law governing the manner of making locations had not been complied with.[62]

[60] *Ante*, § 217.

[61] *Post*, § 448c.

[62] See Ledoux v. Forester, 94 Fed. 600, 602; Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. 714, 715; Leggatt v. Stewart, 5 Mont. 107, 109, 2 Pac. 320, 321, 15 Morr. Min. Rep. 358; Madeira v. Sonoma Magnesite Co., 20 Cal. App. 719, 130 Pac. 175, 178, 179.

A lode location as marked on the ground and as described in the notice may be in all respects regular and within the statutory limit as to both length and width, yet a situation may arise resulting in an excessive width. Where the locator mistakes the course of his vein and locates across instead of along it, an excess of lateral side-line surface results and should be cast off. His surface rights resting on location would properly be defined by lines drawn three hundred feet on each side of the center of the vein as it actually ran.[63]

The validity of such a location is not affected, however, and it has been held that a relocator is not permitted to determine for himself the excess in width and relocate it. The original locator is entitled to possession of the claim as located until he readjusts his lines voluntarily or is called upon to do so by the land department in a patent proceeding. The reason for this rule is based on the inherent difficulties surrounding the situation. It is very frequently impossible, from a practical standpoint, to ascertain even approximately the true position of the vein apex at the surface at the time of making the location in the first instance. To compel a lode claimant to cast off the excess of three hundred feet from his vein apex every time mining developments demonstrated that its position varied from the staked lode line where he had originally assumed the vein apex to exist would result in great insecurity of surface title in many instances. The courts have therefore held that a locator who has staked out his lode in good faith is entitled to the possession of his surface measured from his staked lode

[63] Southern California Ry. v. O'Donnell, 3 Cal. App. 382, 85 Pac. 932, 933; McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823, 825; Harper v. Hill, 159 Cal. 250, 113 Pac. 163, 166, 1 Water & Min. Cas. 585.

line, even though the actual apex of the vein may be found to deviate therefrom.[64]

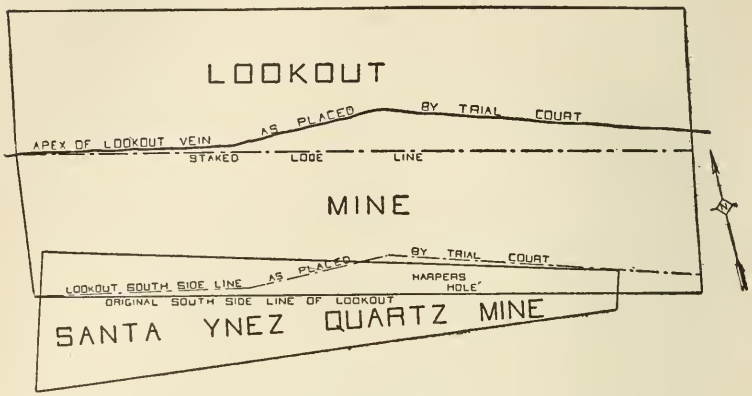


FIGURE 30B.

Figure 30B illustrates the Harper Hill case last cited. The trial court had found the position of the actual vein apex to deviate quite materially from the staked lode line of the Lookout claim, and held that the southerly boundary of this claim must be drawn in and rectified so as to be parallel to the actual vein apex and not more than three hundred feet distant. The supreme court of California reversed this holding and decided that the Lookout owner was entitled to the possession of his entire claim as staked and that a subsequent discovery that the vein apex deviated from the staked center line did not curtail his rights to any portion of the surface.

§ 363. Surface conflicts with prior unpatented locations.—It frequently happens, either through honest mistake or premeditated design, that the lines of a junior location are placed upon or across those of a

[64] Harper v. Hill, 159 Cal. 250, 113 Pac. 163, 166, 1 Water & Min. Cas. 585.

valid and then subsisting prior claim, creating a surface conflict. As to the respective rights of the two locators, so long as the senior claim is perpetuated and remains valid and subsisting, we encounter no difficulty in defining them. The unbroken current of judicial expression enables us to formulate the following legal postulates:

1. A junior locator cannot, by invading the limits of a prior valid and then subsisting claim, and attempting to make a location conflicting with such claim, acquire any rights which might in any way infringe upon those of the previous locator. However regular in form such junior location might be, it is of no effect as against rights conferred upon the prior locator so long as the prior location is subsisting.[65]

[65] Belk v. Meagher, 3 Mont. 65; S. C., on appeal, 104 U. S. 279, 284, 26 L. ed. 735, 1 Morr. Min. Rep. 510; Clipper Mining Co. v. Eli M. & L. Co., 194 U. S. 220, 226, 24 Sup. Ct. Rep. 632, 48 L. ed. 944, and cases cited; Garthe v. Hart, 73 Cal. 541, 15 Pac. 93, 94, 15 Morr. Min. Rep. 492; Souter v. Maguire, 78 Cal. 543, 21 Pac. 183; Argentine M. Co. v. Benedict, 18 Utah, 183, 55 Pac. 559, 561; Kinney v. Fleming, 6 Ariz. 263, 56 Pac. 723, 724, 20 Morr. Min. Rep. 13; Aurora Hill Cons. M. Co. v. 85 Mining Co., 12 Saw. 355, 34 Fed. 515, 521, 15 Morr. Min. Rep. 581; Peoria & Colorado M. & M. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915, 917; Hoban v. Boyer, 37 Colo. 185, 85 Pac. 837; Lockhart v. Farrell, 31 Utah, 155, 86 Pac. 1077, 1078; S. C., in error, 210 U. S. 142, 28 Sup. Ct. Rep. 681, 52 L. ed. 994, 16 L. R. A., N. S., 162; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36, 38; Nash v. McNamara, 30 Nev. 114, 133 Am. St. Rep. 694, 93 Pac. 405, 406, 16 L. R. A., N. S., 168; Farrell v. Lockhart, 210 U. S. 142, 28 Sup. Ct. Rep. 681, 52 L. ed. 994, 16 L. R. A., N. S., 162; Moorhead v. Erie M. & M. Co., 43 Colo. 408, 96 Pac. 253; McCulloch v. Murphy, 125 Fed. 147, 153; Porter v. Tonopah North Star T. & D. Co., 133 Fed. 756, 758; S. C., on appeal, 146 Fed. 385, 386, 76 C. C. A. 657; Willitt v. Baker, 133 Fed. 937, 946; Zerres v. Vanina, 134 Fed. 610, 614; S. C., in error, 150 Fed. 564, 566, 80 C. C. A. 366; Biglow v. Conradt, 159 Fed. 868, 870, 87 C. C. A. 48; Swanson v. Kettler, 17 Idaho, 321, 105 Pac. 1059, 1061; Swanson v. Sears, 224 U. S. 180, 32 Sup. Ct. Rep. 455, 56 L. ed. 721; Becker v. Long, 196 Fed. 721; Bergquist v. West Virginia & Wyoming C. Co.,

To state the postulate concretely in the language of the supreme court of the United States:—

> A valid location appropriates the surface, and the rights given by such location cannot, so long as it remains in force, be disturbed by any acts of third parties. Whatever rights on or beneath the surface passed to the first locator can in no manner be diminished or affected by a subsequent location.[66]

2. The lines of such junior locator may be so laid as to create a surface conflict with the prior location for the purpose of defining for or securing to such junior location, underground or extralateral rights not in conflict with any rights embraced within or acquired by the senior locator.[67]

A sample illustration of these two principles will suffice.

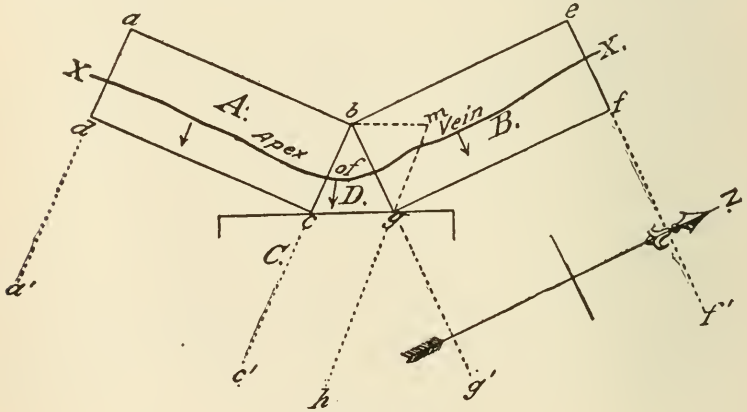


FIGURE 31.

18 Wyo. 234, 106 Pac. 673, 677; Street v. Delta M. Co., 42 Mont. 371, 112 Pac. 701, 704; Stewart v. Reese, 25 L. D. 447; Round Mountain M. Co. v. Round Mountain Sphinx M. Co. (Nev., Jan. 4, 1913), 129 Pac. 308, 312.

[66] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 79, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[67] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 79, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370; Big

Figure 31 represents three lode claims, A, B, D, with priorities in the order named. A and B have so placed the lines of their respective claims as to leave the triangular surface c-b-g with the apex of the vein passing through it, free and open to location. D might have located the triangular tract, but as his end-lines would not have been parallel, no extralateral right could be predicated upon a location in that form.[68] The location in that form would have been valid and the locator would have been entitled to the surface and all underground parts of the vein lying within vertical planes extended downward, but would have been denied all extralateral right.[69]

The underground segment of the vein c-c′ and g-h lying between the extended divergent end-line planes of A and B, b-c-c′ and b-g-g′ was not embraced within either prior location. For the purpose of securing the triangular surface b-c-g′ and also acquiring at least a part of the unappropriated underground segment of the vein, D, with the consent of B, or in the absence of objection, may place his lines b-m and m-g upon the surface of B. By so doing he cannot deprive B of any part of the area in conflict, but by making his location as shown on the diagram, he acquires the free surface ground and underground rights between his extended parallel end-line planes.[70]

Hatchet Cons. M. Co. v. Colvin, 19 Colo. App. 405, 75 Pac. 605; Tonopah & Salt Lake M. Co. v. Tonopah M. Co., 125 Fed. 400, 407.

[68] Montana Limited v. Clark, 42 Fed. 626, 629, 16 Morr. Min. Rep. 81.

[69] *Post*, §§ 365, 582.

[70] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 84, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370; Empire State Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 417, 419, 52 C. C. A. 219, 22 Morr. Min. Rep. 104; Big Hatchet Cons. M. Co. v. Colvin, 19 Colo. App. 405, 75 Pac. 605, 606; Empire

If B should ultimately abandon his location the conflict area would not fall to D.[71] D might, subsequent to the abandonment of the conflict area by B, amend his location and include the overlapping surface,[72] but without some act on his part manifesting an intention to make a new appropriation or acquire a new right to the conflict area after abandonment or forfeiture by B became effectual, this area would not by mere gravity become a part of the junior location,[73] except for the purpose of defining the extralateral right of D. This doctrine was originally announced by the supreme court of the United States in the case of Belk v. Meagher,[74] and was generally recognized throughout the mining regions of the west. It was for the time practically overruled in the later case of Lavagnino v. Uhlig,[75] but subsequently the judicial pendulum swung back to the rule announced in the Belk-Meagher case, and the doctrine of that case as stated in the text is now firmly established.[76]

State Idaho M. & D. Co. v. Bunker Hill & S. M. Co., 131 Fed. 591, 604, 66 C. C. A. 99; S. C., on appeal, Bunker Hill & Sullivan M. & C. Co. v. Empire State Idaho M. & D. Co., 134 Fed. 268, 272. Appeal dismissed, 200 U. S. 613, 26 Sup. Ct. Rep. 754, 50 L. ed. 620; *certiorari* denied, 200 U. S. 617, 26 Sup. Ct. Rep. 754, 50 L. ed. 622; Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57, 59, 22 Morr. Min. Rep. 575; Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 230, 24 Sup. Ct. Rep. 632, 48 L. ed. 944; Tonopah & Salt Lake M. Co. v. Tonopah M. Co., 125 Fed. 400, 407.

71 Belk v. Meagher, 104 U. S. 279, 285, 26 L. ed. 735, 1 Morr. Min. Rep. 510; Oscamp v. Crystal River M. Co., 58 Fed. 293, 295, 7 C. C. A. 283, 17 Morr. Min. Rep. 651; Jordan v. Duke, 6 Ariz. 55, 53 Pac. 197, 201; Reynolds v. Pascoe, 24 Utah, 219, 66 Pac. 1064, 1065.

72 Johnson v. Young, 18 Colo. 625, 34 Pac. 173.

73 Pralus v. Pacific G. & S. M. Co., 35 Cal. 30, 36.

74 104 U. S. 279, 285, 26 L. ed. 735, 1 Morr. Min. Rep. 510.

75 198 U. S. 443, 25 Sup. Ct. Rep. 716, 49 L. ed. 1119.

76 Brown v. Gurney, 201 U. S. 184, 192, 26 Sup. Ct. Rep. 509, 50 L. ed. 717; Farrell v. Lockhart, 210 U. S. 142, 145, 28 Sup. Ct. Rep.

We shall have occasion to again refer to this question.[77]

In the hypothetical case illustrated by figure 31 the placing by D of the location lines across and upon B's surface is not necessarily a trespass.[78]

It may be conceded that such a conflicting junior location may not be made by a forcible entry upon the actual possession of the senior. Perhaps the senior locator might prevent the making of the junior location, so far as the placing of the senior lines over the prior claim was concerned.[79]

It is well settled that no right to any part of the public domain may be initiated through or arise out of a trespass.[80]

But an entry upon the surface of the senior claim openly, peaceably and in good faith, claiming nothing against the prior claim, gives no cause of complaint to the senior claimant.[81]

Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to

681, 52 L. ed. 994, 16 L. R. A., N. S., 162; Swanson v. Sears, 224 U. S. 180, 32 Sup. Ct. Rep. 455, 56 L. ed. 721.

77 *Post*, § 645a.

78 Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 83, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370; Empire State Idaho M. & D. Co. v. Bunker Hill and Sullivan M. & C. Co., 114 Fed. 417, 419, 52 C. C. A. 219, 22 Morr. Min. Rep. 104; Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57, 59, 22 Morr. Min. Rep. 575; Cleary v. Skiffich, 28 Colo. 362, 365, 89 Am. St. Rep. 207, 65 Pac. 59, 60, 21 Morr. Min. Rep. 284; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 285; Doe v. Tyler, 73 Cal. 21, 14 Pac. 375; Moorhead v. Erie M. & M. Co., 43 Colo. 408, 96 Pac. 253, 256.

79 Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 109 Fed. 538, 541, 48 C. C. A. 665, 21 Morr. Min. Rep. 317.

80 *Ante*, § 217.

81 Empire State-Idaho M. & D. Co. v. Bunker Hill M. & C. Co., 114 Fed. 417, 419, 52 C. C. A. 219, 22 Morr. Min. Rep. 104.

the second locator all the benefits which the statute gives to the making of a claim? [82]

The circuit court of appeals for the ninth circuit expresses the following views:—

> It is the settled law that for the purpose of acquiring the extralateral rights conferred by the statute a locator may place his lines on a prior mining location with the consent of such prior locator, or when it is done openly and aboveboard without objection on his part, which in reality constitutes consent.[83]

To what limit this doctrine may be applied is a question difficult to determine. Some unique contentions are made with regard to it which will be considered in the discussion of the extralateral-right problems.

The land department has elaborated this doctrine to some extent, and in passing upon patent applications has recognized the right of a junior locator to cross a senior location, the patent issuing to the junior proprietor for the tract described, excepting and reserving the area in conflict with the senior location.

The following figures illustrate the views of the department on the subject.

Figure 32 exhibits the Hallett and Hamburg lode claims for which a patent was applied, and which were in conflict with the numerous prior locations shown on the diagram. The patent application excluded the

[82] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 84, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[83] Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 417, 419, 52 C. C. A. 219, 22 Morr. Min. Rep. 104; Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 134 Fed. 268, 272; Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 591, 604; appeal dismissed, 200 U. S. 613, 26 Sup. Ct. Rep. 754, 50 L. ed. 620; *certiorari* denied, 200 U. S. 617, 26 Sup. Ct. Rep. 754, 50 L. ed. 622. See, also, Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 230, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

area in conflict with the locations having priority. A protest was filed against the issuance of the patent on the ground, among others, that the end-lines and corners of the claims applied for were within and upon

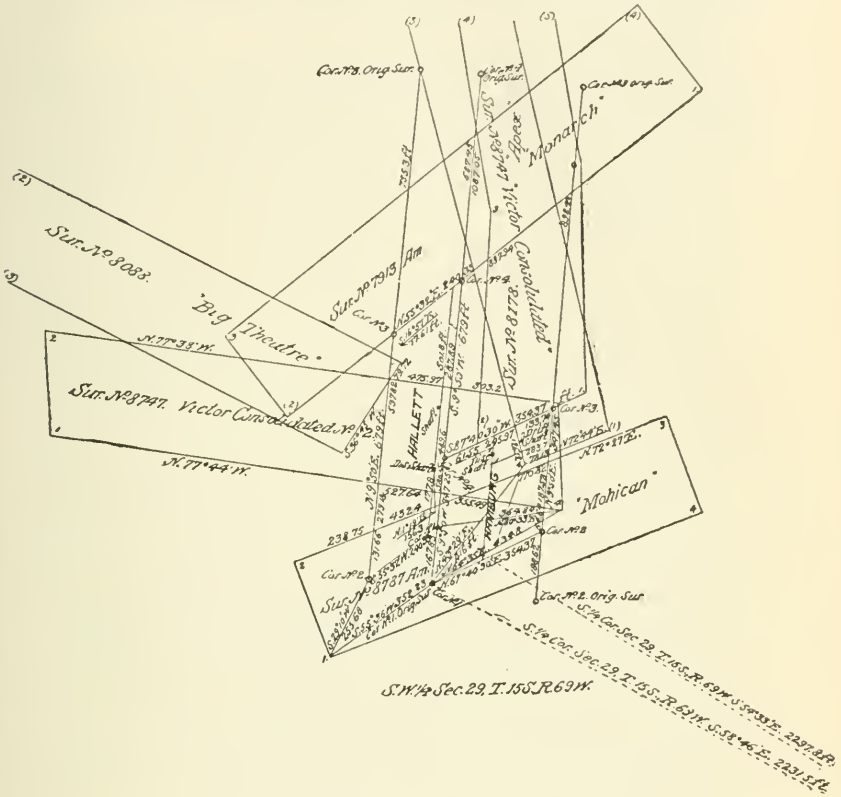


FIGURE 32.

the surface of valid prior locations. The secretary dismissed the protests, upholding the validity of the locations in the form shown on the figure, citing the Del Monte case [84] as authority for his ruling.[85] It re-

[84] 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[85] Hallett and Hamburg Lodes, 27 L. D. 104.

quires more intimate familiarity with the properties delineated on the diagram than the author possesses to determine just what passed by the patent to the Hallett and Hamburg claims after deducting the conflicting areas.

Figure 33 presents a later case involving the same method of location. The Hustler and New Year claims, shown on this figure, were contiguous and held in common ownership. A group patent was applied

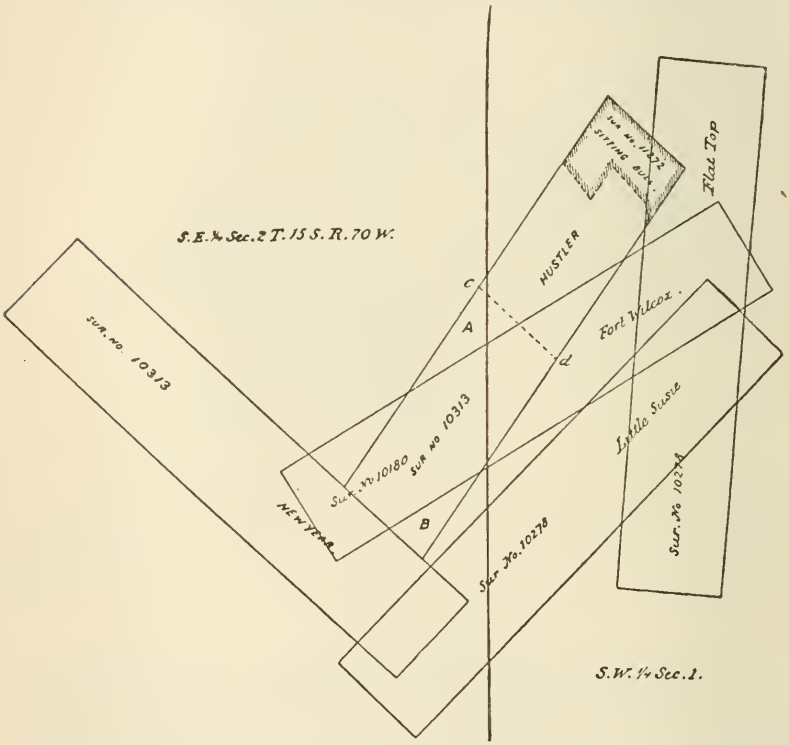


FIGURE 33.

for. Owing to the conflict between the Hustler and Fort Wilcox, the latter being the prior location, the commissioner of the general land office directed the

drawing in of the Hustler end-lines, and making a new end-line, *c-d*. This destroyed the contiguity of the group applied for, and as the applicant accepted for the time being the commissioner's ruling, he received a patent for the New Year alone. He subsequently repented of his action, and applied to the secretary of the interior for a reinstatement of his entry and requested that patent issue for the Hustler, after deducting conflicts with senior locations. The secretary reversed the action of the commissioner, principally on the ground that the ruling cut the claimant off from two small triangular areas marked A and B on the figure, which were embraced within the original location. Patent was directed to issue in accordance with the claimant's application. The Del Monte case was cited as authority for this decision.[86]

In the case of the War Dance lode,[87] a junior location, which ran entirely across a senior location and terminated in another junior but excepted claim, was passed to patent on the strength of the Del Monte case and the decision of the secretary in Hallett and Hamburg lodes (*supra*), as there was a small parcel of free ground outside of the conflicting and excluded area which was within the limits of the original War Dance location. It is manifest from a consideration of the series of decisions handed down by the secretary of the interior on this subject that the rule announced by the supreme court of the United States in the Del Monte case has been applied with extreme liberality, and in several instances at least to conditions which did not fall within either the motive or *rationale* of the judicial decision upon which the later departmental rulings were based. In the light of the later revelation, it

[86] Hustler and New Year Lode Claims, 29 L. D. 668.

[87] 29 L. D. 256.

would be difficult to conceive of a case of junior conflicts with senior locations which would not receive the sanction of the department.

Prior to the decision of the Del Monte case, the land department enforced the rule that the rights of the junior locator did not extend beyond an end-line passing through the point where the lode intersected the exterior line of the senior location,[88] and that the surface right as an adjunct to the lode could not extend beyond that point.[89]

If a junior lode location so intersected a prior claim as to divide the later claim into two parts, the claimant was either compelled to elect which of the two disconnected parts he would take or the entry was confined to that part containing his discovery.[90]

The Del Monte case did not in terms purport to decide anything more than that a junior locator might, for the purpose of defining an extralateral right not secured by prior location, place his end-lines upon the senior claim. The land department permits the laying of such lines entirely across the senior claim, not only for this purpose, but for the purpose of acquiring surfaces not covered by the older location. When the patent issues for this class of claims, it necessarily reserves all property rights pertaining to the senior claim.[91] We do not conceive that there is any wrong done to anyone by the adoption of this rule. An in-

[88] Engineer M. & D. Co., 8 L. D. 361; Consolidated M. Co., 11 L. D. 250; Correction Lode, 15 L. D. 67; Stranger Lode, 28 L. D. 321.

[89] Plevna Lode, 11 L. D. 236.

[90] Andromeda Lode, 13 L. D. 146; Bimetallic Lode, 15 L. D. 309; Mabel Lode, 26 L. D. 675; see Brown v. Gurney, 201 U. S. 184, 192, 26 Sup. Ct. Rep. 509, 50 L. ed. 717.

[91] For a case involving a patent of this character, see Big Hatchet Cons. M. Co. v. Colvin, 19 Colo. App. 405, 75 Pac. 605. See, also, Peoria & C. M. & M. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915.

terpretation of this kind seems the only possible solution of some of the difficulties surrounding locations in districts situated as in Cripple Creek, Colorado, with its intricate network of veins running in every conceivable direction. In fact, the "cross-lode" questions arising in this district, and the difficulty of their solution, have undoubtedly influenced the later departmental rulings. Such rulings have received the sanction of the courts,[92] and the practice based thereon may be said to be definitely settled.

§ 363a. Surface conflicts with prior patented mining claims, millsites, and agricultural lands.—The rule having once been sanctioned that junior lode claimants might lay the lines of their locations upon or across those of a senior lode location, the extension of the doctrine to patented mining claims, millsites, and agricultural lands was not only accompanied with no serious embarrassment, but such result was natural and logical. A valid unpatented mining location, as against every one save the government, is in effect a grant. The estate enjoyed is in the nature of an estate in fee.[93]

There is no reason which could be urged in support of permitting junior locators to lay the lines of their claims across prior unpatented claims which could not be invoked in behalf of similar doctrine as applied to

[92] Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 22, 83 Am. St. Rep. 17, 59 Pac. 607, 616, 50 L. R. A. 209, 20 Morr. Min. Rep. 192; S. C., on appeal, 182 U. S. 499, 21 Sup. Ct. Rep. 885, 45 L. ed. 1200, 21 Morr. Min. Rep. 381; Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 109 Fed. 538, 541, 48 C. C. A. 665, 21 Morr. Min. Rep. 317; S. C., 106 Fed. 471, 472; S. C., on writ of error, sub. nom. Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 417, 419, 52 C. C. A. 219, 22 Morr. Min. Rep. 104; Crown Point M. Co. v. Buck, 97 Fed. 462, 465, 38 C. C. A. 278.

[93] *Post*, § 539.

patented claims of all classes. This is quite forcibly pointed out in the opinion of the secretary of the interior in the case of the Hidee lode,[94] a group application for patent embracing the claims delineated on figure 33A.

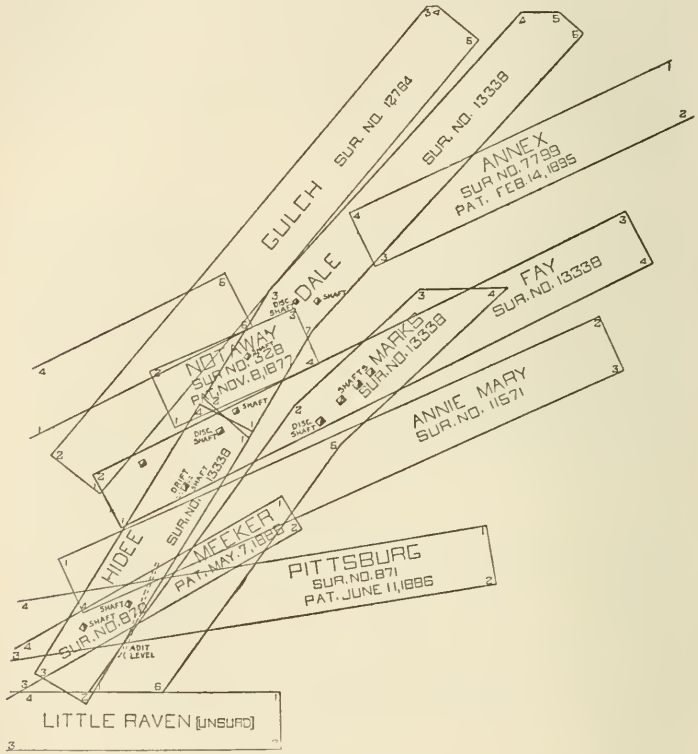


FIGURE 33A.

The group applied for consisted of the Marks, Hidee, Dale and Fay lode claims. The lines of the Marks, Hidee and Dale were laid upon and within prior patented claims. The secretary ruled that the claims were properly located and directed patent to issue.

94 30 L. D. 420.

Judge Hallett, in his opinion dismissing the bill in the Del Monte case (from whose decision an appeal was taken to the circuit court of appeals, which certified the case to the supreme court of the United States), thus announced his views:—

> I think that the lines of a claim may be located wholly or partly upon other territory,—that is, territory which is not open to location,—for the purpose of determining the extralateral questions. In other words, the locator, in order to make a valid location, is bound to locate his lines so as to be of a rectangular form, and if in so locating them he gets upon the territory of other claimants, whether at the time of such location the claims adjacent have or have not been patented, his lines are well laid with reference to the territory subject to location; . . . . and even if the lines fell upon other claims which had already passed to patent, the result would be the same.[95]

The secretary of the interior, in an ably prepared opinion in the Hidee lode case,[96] reached the result concisely and comprehensively stated in the *syllabus* to the case as follows:—

> The location lines of a lode mining claim are used only to describe, define, and limit property rights in the claim, and may be laid within, upon, or across the surface of patented lode claims for the purpose of claiming the free and unappropriated ground within such lines and the veins apexing in such ground, and of defining and securing extralateral underground rights upon all such veins where such lines (*a*) are

[95] Not reported. Judge Hallett's opinion did not form a part of the record certified up to the supreme court of the United States by the circuit court of appeals, eighth circuit. The opinion, however, was before the court of last resort, it having been printed in the brief and argument of appellee (Messrs. Teller, Wolcott, and Vaile), from which the foregoing extract was taken. The secretary of the interior, in his opinion in the Hidee lode, refers to it (30 L. D. 420, 427).

[96] 30 L. D. 420.

established openly and peaceably, (*b*) do not embrace any larger area of surface, claimed and unclaimed, than the law permits.[97]

A similar rule was subsequently prescribed with regard to placing the lines of a junior lode location over prior patented agricultural land.[98] A contrary doctrine had been previously announced.[99]

Following the same line of reasoning, it was also held that an application for a patent to a lode mining claim may embrace ground lying on opposite sides of an intersecting millsite, with the proviso, however, that the lode or vein upon which the location is based has been discovered in both parts of the lode location which were not in conflict with the millsite.[100]

The courts have approached the question determined in the case of the Hidee lode cautiously, and as yet the supreme court of the United States has not spoken the final word on this precise point.

The circuit court of appeals for the ninth circuit upon one occasion, where the precise question was not necessarily involved, stated the rule laid down by the secretary of the interior without comment.[1] In a subsequent case, where the point was directly raised, but not necessary to be decided, as the ultimate determination was reached upon grounds not involving the question, the same court, after announcing the doctrine of the Del Monte case, said: "And perhaps the same

[97] Rule reannounced in Mono Fraction Lode Claim, 31 L. D. 122; Belligerent and Other Lodes, 35 L. D. 22.

[98] Alice Lode Mining Claim, 30 L. D. 481.

[99] Bimetallic Lode, 15 L. D. 309.

[100] Paul Jones Lode, 31 L. D. 359.

[1] Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 109 Fed. 538, 542, 48 C. C. A. 665, 21 Morr. Min. Rep. 317.

thing may be done on patented claims where the lines are established openly and peaceably.''[2]

The supreme court of Colorado, in the case of Davis v. Shepherd[2a] cited the Del Monte case as authority for sustaining the right of a junior locator to lay his lines over the senior claim, and the report of the case shows that the senior claim was patented. But whether the junior location was made prior to the patent is not disclosed.

The supreme court of California held a location valid as to ground free of conflict with prior patented agricultural lands, although all the monuments were placed on patented lands, discovery having been made in land clear of conflict.[3]

The supreme court of Montana expressed grave doubts as to the soundness of the secretary's decision in the Hidee case. While conceding the force of the doctrine of the Del Monte case as applied to junior locations overlapping prior unpatented claims, it fails to find in that case any support for the contention that the junior locator may have that privilege with reference to a senior patented claim. Said that court:—

> After patent has issued, the legal title to the land conveyed by it has passed wholly from the government. The holder of this title is wholly beyond the jurisdiction of the land department; and it would seem that no one can initiate by trespass upon his tract any right whatever, whether it be committed ignorantly or not. . . . . If the law is as counsel contend, then a patent does not convey an absolute estate, but only a qualified fee, and leaves the land still subject to some rights in the government, a doc-

[2] Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 417, 419, 52 C. C. A. 219, 22 Morr. Min. Rep. 104.

[2a] 31 Colo. 141, 72 Pac. 57, 22 Morr. 575.

[3] McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823, 826.

trine for which there seems to be no warrant in the statute. So long as the land is not patented, the legal title is still in the government, and it may be argued with some force that while held under location merely, it is still within the jurisdiction of the land department, and for that reason it is within the province of its authority to say that a junior locator may lawfully go upon it and mark his boundaries and erect his monuments upon its surface in order to initiate rights in lands not carried by it.[4]

We do not understand, however, how the United States government may convey any right to lands by consent of an adjoining owner under patent which it could not convey without such consent.[5]

The case in which the language was used was an extreme one, wherein the doctrine of the Del Monte case, as well as the Hidee case, was put to a very severe test. But as the questions there involved were decided, "conceding for the purpose of the discussion" that the rule announced in the Hidee case was a correct exposition of the law, it cannot be said that the decision of the Montana court is a precedent which condemns the Hidee rule where invoked in a proper case.

The application of these rules will confront us when we come to deal with the law on the subject of extralateral rights, where we shall have occasion to recur to this subject. The foregoing are all the expressions of both courts and land department touching these questions which have come under our observation. We have here been dealing exclusively with the privileges of junior lode claimants. Some discussion of these principles will be necessary when we reach the subject of placer claims.

[4] State v. District Court, 25 Mont. 504, 572, 65 Pac. 1020, 1024.
[5] Id., 1025.

§ 364. **Surface must include apex of vein—Location on the dip.**—There can be no question but that the act of July 26, 1866, contemplated a linear location along the course of the vein as exposed at the surface, where there was an outcropping exposure, or along the top or upper edge of the vein nearest to the surface, where there was no outcrop.[6]

The existing laws require that the top, or apex, of the vein, to some extent at least, should be found within the limits of the location, as defined on the surface,[7] at least as a condition precedent to the enjoyment of the extralateral right. We do not feel justified in asserting that a location on the dip of the vein which does not include any part of the apex is under all circumstances void. It might happen that the true apex of a vein is embraced within a prior grant of such a character as to prevent the owner from following the vein on its downward course out of his vertical boundaries, conditions such as are outlined or suggested in a preceding section;[8] or the deposit may be a bedded vein, occupying a horizontal position in the mass of the mountain, without any definable apex,[9] or where the inclination of the vein from the horizontal is so slight

[6] Eureka Case, 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578; McCormick v. Varnes, 2 Utah, 355; Wolfley v. Lebanon, 4 Colo. 112.

[7] Flagstaff M. Co. v. Tarbet, 98 U. S. 463, 467, 25 L. ed. 253, 9 Morr. Min. Rep. 607; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478, 485, 7 Sup. Ct. Rep. 1356, 30 L. ed. 1140, 17 Morr. Min. Rep. 109; Iron S. M. Co. v. Elgin, 118 U. S. 196, 208, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98, 15 Morr. Min. Rep. 641; Doe v. Sanger, 83 Cal. 203, 23 Pac. 365, 368, 17 Morr. Min. Rep. 298; Watervale v. Leach, 4 Ariz. 34, 33 Pac. 418, 420, 17 Morr. Min. Rep. 568; King v. Amy & Silversmith M. Co., 9 Mont. 543, 24 Pac. 200, 205, 16 Morr. Min. Rep. 38.

[8] *Ante*, § 312a.

[9] See Homestead M. Co., 29 L. D. 689; Jack Pot Lode Mining Claim, 34 L. D. 470; Belligerent and Other Lodes, 35 L. D. 22.

as to require extensive development in order to ascertain which is the top and which the side edge or bottom of the vein, as illustrated in the South Dakota and Idaho cases, discussed in section three hundred and ten, and to some degree in the Leadville cases, referred to in section three hundred and eleven. Under such conditions it is quite possible that by a surface location not covering the true apex the locator might acquire the exclusive right to the surface and the underlying vein as against all persons save those who fortuitously covered the true apex in such a way as to confer upon them the right to laterally pursue the vein underneath the surface of the claim overlying the dip.[10] We are now considering the general rule as announced by the courts, whose opinions do not necessarily deal with all conceivable exceptions. A discussion of possible exceptions involves a consideration of extralateral-right problems which must be reserved for future consideration.

This general rule may be thus concisely stated: A location cannot be made on the middle of a vein or otherwise than on the top, or apex.[11]

As was said by Judge Hallett in one of the early Leadville cases:—

> It is a part of the statute law of the United States that locations shall be upon the top and apex of the

[10] Montana Ore Purchasing Co. v. Boston & M. Cons. C. & S. Co., 27 Mont. 536, 71 Pac. 1005, 1007; Boston & Mont. Cons. Co. v. Montana Ore P. Co., 188 U. S. 632, 638, 23 Sup. Ct. Rep. 440, 47 L. ed. 626; Heinze v. Boston & Montana Cons. C. & S. M. Co., 30 Mont. 484, 77 Pac. 421, 422.

[11] Iron S. M. Co. v. Murphy, 2 McCrary, 121, 3 Fed. 368, 373, 1 Morr. Min. Rep. 548; Stevens v. Williams, 1 Morr. Min. Rep. 557, Fed. Cas. No. 13,414; Leadville M. Co. v. Fitzgerald, 4 Morr. Min. Rep. 380, Fed. Cas. No. 8158; Larkin v. Upton, 144 U. S. 19, 21, 12 Sup. Ct. Rep. 614, 36 L. ed. 330, 17 Morr. Min. Rep. 465; Colorado Central C. M. Co. v. Turck, 50 Fed. 888, 895, 2 C. C. A. 67; S. C., on rehearing, 54 Fed. 257, 4 C. C. A. 312.

vein; . . . . that being done, gives the miner the whole vein,[12] and that the locator must find where the top or apex is and make his location with reference to that.[13]

It is true, he subsequently charged a jury that a junior location along the line of the top, or apex, could not prevail against a senior location on the dip;[14] but this last ruling is not in accord with the decisions of the supreme court of the United States, as we shall have occasion to point out in a subsequent section.[15]

The question of priority is an important and material inquiry only where there are overlapping surfaces, or where the contending parties have some portion of the apex of the same vein and a conflict arises between them involving extralateral bounding planes underneath the surface, such as are found in the Del Monte case,[16] in the Tyler-Last Chance litigation,[17] in the Stemwinder-Emma-Last Chance litigation,[18] and other cases to be noted under the topic of extralateral rights.[19]

Any portion of the apex on its course will be sufficient to support the location,[20] but upon the extent and

12 Iron S. M. Co. v. Murphy, 2 McCrary, 121, 3 Fed. 368, 371, 1 Morr. Min. Rep. 548, 550, 551.

13 Stevens v. Williams, 1 Morr. Min. Rep. 557, 562, Fed. Cas. No. 13,414.

14 Van Zandt v. Argentine M. Co., 8 Fed. 725, 728, 2 McCrary, 159, 4 Morr. Min. Rep. 441.

15 *Post*, § 611.

16 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

17 54 Fed. 284, 4 C. C. A. 329; 71 Fed. 848, 18 Morr. Min. Rep. 303; 61 Fed. 557, 9 C. C. A. 613; 157 U. S. 683, 15 Sup. Ct. Rep. 733, 39 L. ed. 859, 18 Morr. Min. Rep. 205.

18 149 U. S. 787, 13 Sup. Ct. Rep. 1052, 37 L. ed. 941, 960.

19 *Post*, § 596.

20 Larkin v. Upton, 144 U. S. 19, 23, 12 Sup. Ct. Rep. 614, 36 L. ed. 330, 17 Morr. Min. Rep. 465.

course of this apex within the location depends the extent of rights acquired.[21]

As was said by the supreme court of Montana,—

> On principle the identity of the apex of a vein with its spurs and extensions must be the crucial test by which are to be fixed the proprietary rights to that vein and the mineral therein.[22]

Sometimes it happens that a prior locator fails to include the entire width of the apex of the vein within his boundaries, and that such apex is bisected along its course by a side-line common to two locations. While in such cases some of the courts have held that both locations are valid to the extent of everything within their vertical boundaries, but that neither claim has any extralateral right,[23] others award the extralateral right to the prior location.[24] Still others award an extralateral right to both, that of the junior taking effect within the plane of his extended end-lines after they pass beyond the conflict with those of the one hav-

21 Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 66, 67, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 303; Stevens v. Williams, 1 McCrary, 480, 1 Morr. Min. Rep. 566, Fed. Cas. No. 13,413; Cosmopolitan M. Co. v. Foote, 101 Fed. 518, 20 Morr. Min. Rep. 497, and cases there cited; Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 102 Am. St. Rep. 23, 62 L. R. A. 555, 72 Pac. 447, 22 Morr. Min. Rep. 585.

22 Butte & Boston M. Co. v. Société Anonyme des Mines, 23 Mont. 177, 75 Am. St. Rep. 505, 58 Pac. 111, 113.

23 Hall v. Equator, Carpenter's Mining Code, 3d ed., p. 65; Raymond's "Law of the Apex." The case is not reported elsewhere. See quotations from this case under the Broad lode discussion, *post*, § 583.

24 Bullion Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 3, 11 Pac. 515, 524; St. Louis M. & M. Co. v. Montana Limited, 104 Fed. 664, 668, 44 C. C. A. 120, 56 L. R. A. 725, 21 Morr. Min. Rep. 57; Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 106 Fed. 471, 473.

ing priority,[25] a question fully discussed in another section.[26] But all courts agree that such a location covering a part of the width of the apex is valid, to some extent at least. They differ only as to the extent of the rights conferred on the respective locators. We shall necessarily elaborate the discussion of the "broad lode" question when dealing with the subject of extralateral rights.[27] Questions of this character are so intimately associated with other problems as to render it impossible to consider them without anticipating, to some degree at least, their application in connection with the subjects with which they are blended.

It has been strenuously urged that a location, in order to enjoy any extralateral privileges, should be so laid on the surface as to cover the true course of the vein on a level,—i. e., the engineer's strike, as explained in a previous section,[28]—regardless of the course of the apex at or near the surface; that the locator must before perfecting his location ascertain the strike, or course, of the vein on a level, and so lay his end-lines that in following the vein in its downward course he would not follow it more along the course than upon the true dip. This contention, however, has thus far received no encouragement from the courts.

It was said by the supreme court of the United States in the Flagstaff case (italics are ours):—

> We do not mean to say that a vein must necessarily crop out upon the surface in order that loca-

[25] Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 417, 419, 52 C. C. A. 219, 22 Morr. Min. Rep. 104, reversing 106 Fed. 471, *supra*.

[26] *Post*, § 596.

[27] *Post*, § 583.

[28] § 319.

tions may be properly laid upon it. If it lies entirely beneath the surface and the *course* of its *apex* can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein, and locations may be properly made on the surface above it so as to secure a right to the vein beneath. But where the vein does crop out along the surface, or is so slightly covered by foreign matter that the *course* of its *apex* can be ascertained by ordinary surface exploration, we think that the act of congress requires that this course should be substantially followed in laying claims and locations upon it. Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of a vein should correspond with its strike or the line of a level run through it; but this can rarely be ascertained until considerable work has been done and after claims and locations have become fixed. The most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined.[29]

The rule is well settled that the extralateral right to a vein or lode outcropping at the surface is fixed by the course of the vein or lode at the surface and not by the course on a level.[30]

The fallacy of a contrary contention may be demonstrated by the illustration of a hypothetical case.

[29] Flagstaff v. Tarbet, 98 U. S. 463, 469, 25 L. ed. 253, 9 Morr. Min. Rep. 607.

[30] Last Chance M. Co. v. Bunker Hill & S. M. & C. Co., 131 Fed. 579, 589, 66 C. C. A. 299; appeal dismissed, 200 U. S. 613, 26 Sup. Ct. Rep. 754, 50 L. ed. 620; certiorari denied, 200 U. S. 617, 26 Sup. Ct. Rep. 754, 50 L. ed. 622; Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 591, 596, 66 C. C. A. 99; *certiorari* denied, 200 U. S. 617, 26 Sup. Ct. Rep. 754, 50 L. ed. 622. See, also, Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 134 Fed. 268, 272.

Figure 34 represents two locations—A and B. The outcropping vein is exposed on a steep hillside, so that the course of the outcropping apex is widely divergent from that of the true course of the vein on a level,—i. e., the *strike*-line. This is not an uncommon occurrence. It is plain that the course of the apex, *x-y-z*, is the "true course of the vein upon the surface." Let *x* represent the point of discovery, and let the strike be determined by means of a short discovery tunnel, *x-w*. The question suggested is, Should the discoverer on making his location follow the line of strike as in location A, ignoring the segment of the apex, *y-z*, or should he follow the apex as in location B?

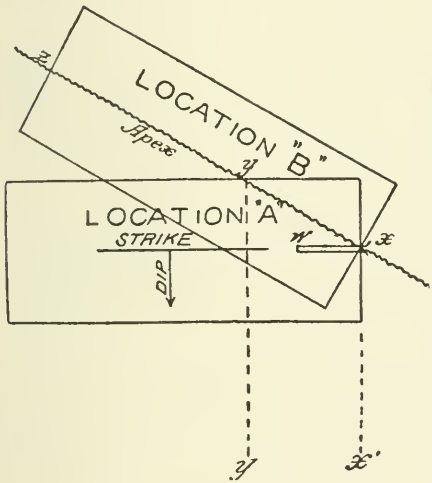


FIGURE 34.

If he selected A, he would lose all rights on the vein after it departed out of the side-line at *y*. This has been conclusively determined by the courts.[31]

Sufficient has been said to demonstrate that in making locations on the surface regard should be had to the position of the apex, outcropping or

[31] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 65, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370; Clark v. Fitzgerald, 171 U. S. 92, 18 Sup. Ct. Rep. 941, 43 L. ed. 87; Parrot Silver and Copper Co. v. Heinze, 25 Mont. 139, 87 Am. St. Rep. 386, 53 L. R. A. 491, 64 Pac. 326, 328, 21 Morr. Min. Rep. 232; Ajax Gold Mining Company v. Hilkey, 31 Colo. 131, 102 Am. St. Rep. 23, 62 L. R. A. 555, 72 Pac. 447, 22 Morr. Min. Rep. 585.

blind, as it actually exists in the ground located, if the locator desires to secure the maximum rights on the vein at and underneath the surface as contemplated by the mining laws. His rights will suffer diminution in proportion to his disregard of this requirement.

> Whenever a party has acquired the title to ground within whose surface area is the *apex* of a vein with a few or many feet along its [*the apex's*] course or strike, a right to follow the vein on its dip for the same length ought to be awarded to him if it can be done, and only if it can be done under any fair and natural construction of the language of the statute. If the surface of the ground was everywhere level and veins constantly pursued a straight line, there would be little difficulty in legislation to provide for all contingencies, but mineral is apt to be found in mountainous regions where great irregularity of surface exists and the course or strike of veins is as irregular as the surface, so that many cases may arise in which statutory provisions will fail to secure to a discoverer of a vein such an amount thereof as equitably it would seem he ought to receive.[32]

It requires no argument to demonstrate that in the use of the terms "course" and "strike of the vein," appearing in the foregoing quotation, the court had no reference to the technical engineer's strike of the vein or to the course of the vein on a level. "Strike," as we have heretofore explained, is the equivalent to the course on a level.[33] Where the ground is undulating there can be no "strike" of an apex. The court in its opinion referred to the course of the *apex*. This is not only manifest from the entire context, but is

[32] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 66, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[33] *Ante*, § 319.

emphasized in another portion of the opinion,[34] where the court quotes approvingly from a decision by Judge Beatty, United States district judge of Idaho, sitting as circuit judge, as follows (italics are ours):—

> Upon the fact that *an apex* is within the surface lines all his underground rights are based. When, then, he owns an *apex*, whether it extends through the entire or through but a part of his location, it should follow that he owns an equal length of the ledge to its utmost depth. These are the important rights granted by the law. Take them away and we take all from the law that is of value to the miner.[35]

§ 365. The end-lines.—The function of end-lines may be said to be twofold:—

(1) They stop the pursuit of the vein on its strike;[36]

(2) When properly constructed with reference to the located lode, permitting the exercise of the extralateral right, they may be produced indefinitely in their own direction, so that vertical planes drawn downward through them, as so produced, carve out a segment of the vein throughout its entire depth, the ownership of which becomes vested in the locator,[37] provided that the end-line planes as extended do not conflict with the extralateral-right planes of a prior locator.

While there is liberty of width within the statutory limit, the law clearly contemplates that the end-lines shall have substantial existence in fact, and in length

[34] 171 U. S. 91, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[35] Tyler M. Co. v. Last Chance M. Co., 71 Fed. 848, 851. See, also, Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 102 Am. St. Rep. 23, 72 Pac. 447, 449, 62 L. R. A. 555, 22 Morr. Min. Rep. 585.

[36] Ajax Gold M. Co. v. Hilkey, 31 Colo. 131, 102 Am. St. Rep. 23, 72 Pac. 447, 449, 62 L. R. A. 555, 22 Morr. Min. Rep. 585.

[37] Ajax Gold M. Co. v. Hilkey, 31 Colo. 131, 102 Am. St. Rep. 236, 72 Pac. 447, 449, 62 L. R. A. 555, 22 Morr. Min. Rep. 585.

shall reasonably comport with the width of the claim as located.[38]

The location of a mining claim, as made and defined, must control not only the rights of the claimant to the vein or lode within its surface, but also any extralateral rights. The locator must stand upon his own location, and can take only what it will give him under the law. The courts cannot relocate his claim and make new side or end lines.[39]

As heretofore observed,[40] the act of 1866 did not in terms mention end-lines, although in the sense that they were necessary to determine the right to pursue the vein on the longitudinal or horizontal course, they were implied.[41] They were not required to be parallel.[42]

Under the act of May 10, 1872, however, their substantial parallelism, or at least their nondivergence in

[38] Jack Pot Lode Claim, 34 L. D. 470; Belligerent & Other Lodes, 35 L. D. 22.

[39] King v. Amy & Silversmith M. Co., 152 U. S. 222, 228, 14 Sup. Ct. Rep. 510, 38 L. ed. 419, 18 Morr. Min. Rep. 76; Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 88, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370; Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968.

[40] *Ante*, § 58.

[41] Eureka Case, 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578.

[42] Iron S. M. Co. v. Elgin M. Co., 118 U. S. 196, 208, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98, 15 Morr. Min. Rep. 641; Walrath v. Champion, 63 Fed. 552, 556; Cons. Wyoming v. Champion, 63 Fed. 540, 550, 18 Morr. Min. Rep. 113; Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. 597, 599; S. C., 83 Fed. 658, 669, 28 C. C. A. 333, 19 Morr. Min. Rep. 118; Eureka Case, 4 Saw. 302, 309, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578; Richmond M. Co. v. Eureka M. Co., 103 U. S. 839, 847, 26 L. ed. 557, 9 Morr. Min. Rep. 634; Argonaut M. Co. v. Kennedy M. & M. Co., 131 Cal. 15, 28, 82 Am. St. Rep. 317, 63 Pac. 148, 152, 21 Morr. Min. Rep. 163; Central Eureka M. Co. v. East Central Eureka M. Co., 146 Cal. 147, 9 L. R. A., N. S., 940, 79 Pac. 834, 835; affirmed, 204 U. S. 266, 27 Sup. Ct. Rep. 258, 51 L. ed. 476.

the direction of the dip, is an absolute essential to the right of extralateral pursuit.[43] It has been said that the provisions of this act as to parallelism are merely directory, and that no consequence is attached to a deviation from its direction.[44] But this is undoubtedly an erroneous view.[45]

A location with nonparallel end-lines is not necessarily wholly void. There is liberty of surface form within the statutory limits.[46] If other conditions are complied with, such a location will, subject to the dip rights of others who have properly located on the apex, hold everything within vertical planes drawn through the surface boundaries. The rights conferred, however, by such a location are not so great as in case of one having the end-lines parallel. The consequences of nonparallelism of end-lines will be fully presented in a subsequent chapter, when dealing with the subject of extralateral rights.[47]

While it may be true that the highest type of the ideal or theoretical location may suggest that the end-lines of a location should be at right angles to the

[43] Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 974.

[44] Eureka Case, 4 Saw. 302, 319, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578; Horswell v. Ruiz, 67 Cal. 111, 7 Pac. 197, 15 Morr. Min. Rep. 488.

[45] Iron S. M. Co. v. Elgin M. Co., 118 U. S. 196, 208, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98, 15 Morr. Min. Rep 641; Argonaut M. Co. v. Kennedy M. Co., 131 Cal. 15, 23, 82 Am. St. Rep. 317, 63 Pac. 148, 152, 21 Morr. Min. Rep. 163. The Argonaut-Kennedy case was considered by the supreme court of the United States, but the question here discussed was not considered. 189 U. S. 1, 23 Sup. Ct. Rep. 501, 47 L. ed. 685.

[46] Walrath v. Champion M. Co., 171 U. S. 293, 312, 18 Sup. Ct. Rep. 909, 43 L. ed. 170, 19 Morr. Min. Rep. 410; Gibson v. Hjul, 32 Nev. 360, 108 Pac. 759.

[47] *Post*, § 582.

course of the vein,[48] there is nothing in the law which requires it, either expressly or by implication. In fact, locations, as a rule, which, as we have heretofore explained, are required to conform to the surface course of the apex, could rarely be made to also conform to such ideal, without the loss of substantial rights on the vein.[49] While the ideal location may suggest the form shown in figure 35, where the end-lines cross the lode at right angles to its general course, a location

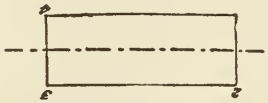


FIGURE 35.

marked on the ground with end-lines crossing the apex of the lode at acute or obtuse angles, as indicated in figures 36 and 37, is just as valid and complete, and

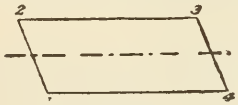


FIGURE 36.

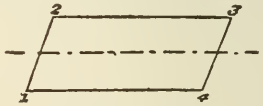


FIGURE 37.

the extent of property rights conferred thereby just as great, as in the ideal location, because the end-lines cross the lode, and are parallel. The land officers have no right to require that an end-line shall make a right angle, or any other particular angle, with the general direction of the vein. It is the locator's privilege to give such direction to his end-lines as he pleases, so long as they are across the apex of the vein, are parallel to each other, and the length of the lode

[48] See opinion in Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, where the court says *arguendo:* "Miners know that the side-lines of a claim ought to be parallel to its strike and its end-lines at right angles to its strike."

[49] *Ante,* § 364.

measured between them, on direct line between the extreme points on the vein within the location, does not exceed the statutory limit of fifteen hundred feet.[50]

> While the statute requires parallelism of the end-lines, and the courts have held that they may not be laid so divergent as to include more in length upon the dip of the vein than is allowed in length upon the surface, neither the statute nor any decision to which our attention has been called defines any particular angle at which the end-lines shall cross the general course of the vein in order that the extralateral right given by the statute may exist . . . , and that the extralateral right conferred by the statute may and does exist without regard to the angle at which the end-lines cross the general course of the vein has been held by both the supreme court and this court.[51]
>
> There is nothing in the mining act that can possibly justify the conclusion that this extralateral right must be limited to forty-five degrees or to any other particular variation from the true dip.[52]

It is a matter of common knowledge that veins are not of uniform value throughout, but that frequently the "pay ore" occurs in "shoots," at intervals in the course of the vein, and that these "shoots" have frequently, in the language of the miner, a right or left

[50] Monarch of the North Mining Claim, 8 Copp's L. O. 104.

[51] Last Chance Min. Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 579, 590, 66 C. C. A. 299; Empire State-Idaho M. & D. Co. v. Bunker Hill M. & C. Co., 131 Fed. 591, 596, 66 C. C. A. 99; appeal dismissed, 200 U. S. 613, 26 Sup. Ct. Rep. 754, 50 L. ed. 620; *certiorari* denied, 200 U. S. 617, 26 Sup. Ct. Rep. 754, 50 L. ed. 622; Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 417, 419, 52 C. C. A. 219, 22 Morr. Min. Rep. 104.

[52] Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 134 Fed. 268, 272.

hand "pitch." There is no reason why the locator should not be permitted to mark his end-lines, observing the statutory requirement as to parallelism, with regard to the pitch of the ore bodies within the vein, if he is fortunate enough to detect their existence and direction during his work of preliminary exploration.

If it be true, and the courts so assert, that the theory of the law requiring this parallelism is, that the miner may have only as much of the lode underneath as he has apex within his surface,[53] then the object is accomplished by making a location in the form suggested by figures 36 and 37, as well as by that suggested by figure 35. The subsequent locator is in no sense injured, and will be compelled to either make his location conform to the lines of the first discoverer or take the chance of losing a segment of the vein by underground conflict with the prior appropriator.[54]

As heretofore observed, however, the failure to construct the end-lines so that they are parallel to each other does not render the location absolutely void, so long as it is within the statutory limit. A location in the form of a horseshoe [55] or an isosceles triangle [56] will,

[53] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 85, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370; Doe v. Sanger, 83 Cal. 203, 213, 23 Pac. 365, 368, 17 Morr. Min. Rep. 298; Carson City G. & S. M. Co. v. North Star M. Co., 83 Fed. 658, 669, 28 C. C. A. 333, 19 Morr. Min. Rep. 118.

[54] Flagstaff M. Co. v. Tarbet, 98 U. S. 463, 25 L. ed. 253, 9 Morr. Min. Rep. 607; Eureka Case, 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578.

[55] Iron S. M. Co. v. Elgin M. Co., 118 U. S. 196, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98, 15 Morr. Min. Rep. 641.

[56] Montana Co. Limited v. Clark, 42 Fed. 626, 16 Morr. Min. Rep. 81; Walrath v. Champion M. Co., 171 U. S. 293, 312, 18 Sup. Ct. Rep. 909, 43 L. ed. 170, 19 Morr. Min. Rep. 410.

subject to the extralateral right of others who have properly located the apex, hold whatever may be found within vertical planes drawn through the surface boundaries.

The requirement as to parallelism of end-lines, as a condition precedent to the exercise of the extralateral right, means that they should be parallel throughout, or at least should not diverge in the direction of the dip.[57]

This requirement of the law is not satisfied by constructing broken end-lines. "They must be straight lines, not broken or curved."[58] A survey for patent made in the form indicated in figure 38 would be rejected.[59]

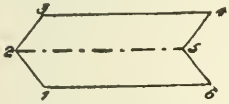


FIGURE 38.

A lode locator may not in the same location lawfully include any surface area or acquire any incidental mining rights therein outside of the course of vertical planes drawn downward through the established end-lines of his claim extended in their own direction.[60]

Where the location as originally marked upon the ground has nonparallel end-lines, it may be rectified at any time, if such rectification does not interfere with intervening rights.[61]

57 For full discussion of the subject of converging end-lines and the extent of the extralateral right which may be enjoyed therewith, see, *post*, § 582.

58 Walrath v. Champion M. Co., 171 U. S. 293, 311, 18 Sup. Ct. Rep. 909, 43 L. ed. 170, 19 Morr. Min. Rep. 410, said to be one of the iron-clad rules; Belligerent and Other Lodes, 35 L. D. 22.

59 Instructions to Surveyor-general, 10 Copp's L. O. 86.

60 Pilot Hill and Other Lodes, 35 L. D. 592. See diagram opposite p. 594, 35 L. D.

61 Doe v. Sanger, 83 Cal. 203, 23 Pac. 365, 368, 17 Morr. Min. Rep. 298;

A locator of a mining claim may abandon a portion of his original location without forfeiting any rights he may have to the remainder of the claim.[62]

There is no necessity for the two end-lines being of the same length. If they both cross the lode and are parallel to each other, the fact that one may be six hundred feet long and the other shorter is entirely immaterial, provided that both have substantial existence in fact, and that as to length they reasonably comport with the width of the claim as located.[63]

In previous sections[64] we have fully explained the state of the law regarding the privileges granted to junior locators of placing lines over senior locations, as well as over patented lands, both mining and agricultural. It is unnecessary to repeat what was there said.

The difference between the former rulings of the land department and those now governing that tribunal in the administration of the mining laws may be illustrated by the use of a diagram (figure 39). Formerly A, the junior locator, would have been compelled to draw his end-line at X where the apex of the vein entered the side-line of the senior claim B, making a reconstructed end-line, *b-a*. Under the present rulings the

Doe v. Waterloo M. Co., 54 Fed. 935; Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 969.

[62] Tyler M. Co. v. Sweeney, 54 Fed. 284, 289, 4 C. C. A. 329; Last Chance M. Co. v. Tyler M. Co., 61 Fed. 557, 560, 9 C. C. A. 613; Tyler M. Co. v. Last Chance M. Co., 71 Fed. 848, 850, 18 Morr. Min. Rep. 303; Carrie S. G. M. Co., 29 L. D. 287; In re Connell, 29 L. D. 574.

[63] Jack Pot Lode Mining Claim, 34 L. D. 470; Belligerent and Other Lodes, 35 L. D. 22.

[64] §§ 363, 363a.

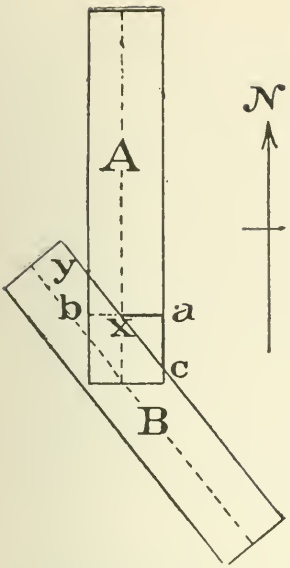


FIGURE 39.

junior may place his end-line entirely within the senior claim, as indicated in the diagram, or he may extend his side-lines entirely across the senior claim, placing the end-line on unappropriated ground; and this may be done whether the senior claim has passed to patent or not.

§ 366. **The side-lines.**—The primary function of the side-lines is to connect the opposite extremities of the end-lines, and to complete the inclosure of a surface within which is found the apex of the discovered lode. As the width of a location is fixed with reference to the middle of the vein, the law contemplates that this must be ascertained by actual exploration and development, and cannot be assumed to be in an unexplored position.[65]

Where the vein outcrops at the surface, there can be no question as to the point from which the lateral measurement must begin. When the discovery shaft develops the vein at some distance below the surface, and the locator does not determine by any further development that the nearest actual surface point is elsewhere, and the fact does not otherwise appear, the land department has ruled that, for executive purposes, the middle of the vein as disclosed in the shaft will be as-

[65] In re Albert Johnson, 7 Copp's L. O. 35.

sumed to be the point from which lateral measurements are to be calculated.[66]

According to the regulations of the department, lateral measurements cannot extend more than three hundred feet on either side. Four hundred feet cannot be taken on one side and two hundred on the other; but if, by reason of prior claims, the full width allowed cannot be taken on one side, the locator will not be restricted to less than three hundred feet on the other.[67]

It must be presumed for executive purposes that the lode proceeds in a straight line in the center of the plat of patent survey, unless evidence be submitted showing a different direction. If the course of the vein (at the surface) diverges from a straight line, the applicant for patent should indicate the direction and adjust his survey accordingly.[68]

The ingenuity of the law officers of the land department has been severely taxed in an effort to determine the position of the "middle of the vein" in the case of bedded or blanket deposits, for the purpose of establishing the side-lines of a claim located thereon. The department was admonished by the supreme court of the United States that this class of deposits fell within the legal definition of a lode, and was subject to location under the lode laws.[69]

The admonition of Judge Hallett to the miner, that he "must find where this top, or apex, is, and make his location with reference to that," possesses but little

[66] Taylor v. Parenteau, 23 Colo. 368, 48 Pac. 505, 507, 18 Morr. Min. Rep. 534; In re Hope M. Co., 5 Copp's L. O. 116; par. 5, Circ. Instructions, July 26, 1901 (see Appendix).

[67] Par. 5, Mining Regulations (see Appendix).

[68] Bimetallic M. Co., 15 L. D. 309; see Harper v. Hill, 159 Cal. 250, 113 Pac. 162, 164, 1 Water & Min. Cas. 585.

[69] Iron S. M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394, 400, 72 Sup. Ct. Rep. 543, 36 L. ed. 201, 17 Morr. Min. Rep. 436.

persuasive force, when considered with reference to a horizontal, or blanket vein, which has no apex. The land department pointed a way out of the dilemma by establishing the following rule:—

> The only reasonable solution of the problem seems to be to hold that the apex of the lode is coextensive with the distance between the side-lines of the location, and that every part or point of such apex within those limits is as much the middle of the vein within the intent and meaning of section twenty-three hundred and twenty of the Revised Statutes as any other part.[70]

In other words, the entire upper surface of the "blanket" is apex, and the middle of the apex is anywhere one chooses to establish an arbitrary line. While the result reached by the secretary is a rational one, the reasoning is not altogether faultless; but considering the embarrassments surrounding cases of this character, any rational or equitable result should be exempt from adverse criticism. After a patent issues for a claim of this character an apex would be conclusively presumed to exist within the limits of the claim,[71] and the same presumption would be indulged as to the regularity of the form of the surface.[72] The patentee or locator on this class of deposits would hold everything within his vertical boundaries, without serious danger from outside apex proprietors on the same vein.[73]

[70] Homestake M. Co., 29 L. D. 689, 691.

[71] Iron S. M. Co. v. Campbell, 17 Colo. 267, 272, 29 Pac. 513.

[72] *Post*, § 778.

[73] In the case of Jack Pot Lode Mining Claim, 34 L. D. 470, the locator constructed a zigzag lode line on a blanket deposit, so that he had an irregular shaped figure eight hundred feet wide at one end and two-tenths of an inch at the other. This form was given to the location on the theory that by constructing the zigzag apex line the locator could secure a greater width than six hundred feet. The de-

Side-lines, properly drawn, run on each side of the course of the vein, distant not more than three hundred feet from the middle of such vein;[74] but there is no command that they should be parallel.[75] So long as they keep within the statutory width they may have angles and elbows,[76] as in figure 40, or converge toward each other, as in figure 41, without jeopardizing any rights, so far as the located lode is concerned, if the end-lines are properly constructed with reference to such lode. A locator, whose surface lines are constructed as in figure 41, of course obtains less area than is embraced in the ideal location, but otherwise he

FIGURE 40.

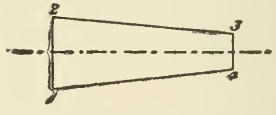


FIGURE 41.

suffers no diminution of rights from those acquired by the ideal. The parallelism or nonparallelism of the side-lines may, however, become an important factor if the locator makes a mistake, as he frequently does, as to the course of his vein, and locates crosswise instead of along the vein.

While side-lines may converge as indicated on figure 41, the general rule is not to be ignored that the end-

partment directed a reformation of the lines of the claim. The rule in the Jack Pot case was followed in Belligerent and Other Lodes, 35 L. D. 22.

[74] King v. Amy & Silversmith M. Co., 152 U. S. 222, 228, 14 Sup. Ct. Rep. 510, 38 L. ed. 419, 18 Morr. Min. Rep. 76; Southern California Ry. v. O'Donnell, 3 Cal. App. 382, 85 Pac. 932, 934; McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823, 825.

[75] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 84, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370; Woods v. Holden, 26 L. D. 198, 206; Stevens v. Williams, 1 McCrary, 480, Fed. Cas. No. 13,413, 1 Morr. Min. Rep. 566.

[76] McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823, 826.

lines must have substantial existence in fact and shall reasonably comport as to length with the width of the claim.[77]

The validity of a location is not impaired by the later determination that the apex of the vein runs out of a line located as a side-line.[78] The extent of the rights conferred by the location, under such conditions, would necessarily be abridged.[79]

Where a location is of excessive width, the excess should be cast off, so that the middle of the vein will be in the center of the location.[80]

The width of a mining claim, when that is the only question involved, is the perpendicular distance between the side-lines. End-lines are not always at right angles to side-lines, and in such cases the width measured along the end-line may be in excess of six hundred feet, but this is not the guide to the determination of the width.[81]

§ 367. **Side-end lines.**—End-lines are not always those which are designated as such by the locator. If the vein does not cross the line called by him an end-line, it is not in law an end-line. In such case it performs the mere function of a side-line. In all cases

[77] Jack Pot Lode Claim, 34 L. D. 470; Belligerent and Other Lodes, 35 L. D. 22.

[78] Beik v. Nickerson, 29 L. D. 662.

[79] Southern California Ry. Co. v. O'Donnell, 3 Cal. App. 382, 85 Pac. 932, 934; Harper v. Hill, 159 Cal. 250, 113 Pac. 162, 166, 1 Water & Min. Cas. 585.

[80] Lakin v. Dolly, 53 Fed. 333, 337; Taylor v. Parenteau, 23 Colo. 368, 48 Pac. 505, 507, 18 Morr. Min. Rep. 534; Bonner v. Meikle, 82 Fed. 697, 705, 19 Morr. Min. Rep. 83.

[81] Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57, 58, 22 Morr. Min. Rep. 575. In the opinion in this case the limit of width is said to be three hundred feet. That is the limit fixed by the Colorado statute. Statutes 1911, p. 515; *ante*, § 361.

where a vein crosses a side-line, the side-line performs the function of an end-line, to the extent, at least, that it stops the pursuit of the vein on its strike. It is therefore to this extent in law an end-line,[82] whether so intended by the locator or not.[83] We call it a side-end line for descriptive purposes. Whether the side-end line performs the function of an end-line for the purpose of determining the extralateral right, will depend upon circumstances. If the vein crosses two side-lines, substantially as in the Flagstaff-Tarbet[84] and Argentine-Terrible[85] cases, where the crossed side-lines are parallel, there is no reason why the vein may not be followed on its downward course throughout its entire depth, between vertical planes drawn downward through the side-end lines, produced indefinitely in their own direction, and the courts have so held. If the side-end lines are not parallel, as those lines are

[82] Flagstaff M. Co. v. Tarbet, 98 U. S. 463, 467, 25 L. ed. 253, 9 Morr. Min. Rep. 607; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478, 485, 7 Sup. Ct. Rep. 1356, 30 L. ed. 1140, 17 Morr. Min. Rep. 109; King v. Amy & Silversmith M. Co., 152 U. S. 222, 228, 14 Sup. Ct. Rep. 510, 38 L. ed. 419, 18 Morr. Min. Rep. 76; Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 65, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370; Eilers v. Boatman, 3 Utah, 159, 2 Pac. 66, 71, 15 Morr. Min. Rep. 462; Stevens v. Williams, 1 Morr. Min. Rep. 557, Fed. Cas. No. 13,414; Tombstone M. & M. Co. v. Wayup M. Co., 1 Ariz. 426, 25 Pac. 794, 796; Watervale M. Co. v. Leach, 4 Ariz. 34, 33 Pac. 418, 421, 17 Morr. Min. Rep. 568; Colorado Cent. R. R. v. Turck, 50 Fed. 888, 896, 2 C. C. A. 67; S. C., on rehearing, 54 Fed. 262, 4 C. C. A. 313; Tyler M. Co. v. Sweeney, 54 Fed. 284, 292, 4 C. C. A. 329; New Dunderberg M. Co. v. Old, 79 Fed. 598, 606, 25 C. C. A. 116; Cosmopolitan M. Co. v. Foote, 101 Fed. 518, 521, 20 Morr. Min. Rep. 497; Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57, 22 Morr. Min. Rep. 575.

[83] Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 109 Fed. 538, 540, 48 C. C. A. 665, 21 Morr. Min. Rep. 317.

[84] 98 U. S. 463, 25 L. ed. 253, 9 Morr. Min. Rep. 607.

[85] 122 U. S. 478, 7 Sup. Ct. Rep. 1356, 30 L. ed. 1140, 17 Morr. Min. Rep. 109.

indicated in figure 41, and the dip of the vein is toward their convergence, it is possible that these lines may be extended in their own direction until they meet, and the locator may pursue the vein in depth to the vertical line of junction between the two planes. There is some difference in judicial opinion as to this.[86] If the dip is in the direction of the divergence, there certainly is no extralateral right. The consideration, however, of this character of cases, together with those where a vein crosses one end-line and one side-line, will be deferred until we reach the subject of extralateral rights.

Article VII. The Marking of the Location on the Surface.

§ 371. Necessity for, and object of, marking.
§ 372. Time allowed for marking.
§ 373. What is sufficient marking under the federal law.
§ 374. State statutes defining the character of marking.
§ 375. Perpetuation of monuments.

§ 371. Necessity for, and object of, marking.—The Revised Statutes of the United States[87] contain the mandatory provision, that the "location must be distinctly marked on the ground so that its boundaries can be readily traced." There is no escape from this requirement. While it is possible that state statutes or local district regulations may particularize as to the character of the marking, they cannot dispense with the necessity for compliance with the law of congress. While, as we shall hereafter point out, time is allowed within which to establish the boundaries, until this is

[86] *Post*, § 590.

[87] § 2324; Comp. Stats. 1901, p. 1426; 5 Fed. Stats. Ann. 19.

done the location is not complete.[88] The requirement is an imperative and indispensable condition precedent to a valid location,[89] and is not to be "frittered away by construction."[90] After the discovery, it is the main act of original location.[91] This was the rule under the Spanish and Mexican law.[92] The object of the law in requiring the location to be marked on the ground is to fix the claim, to prevent floating or swinging, so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue.[93] It also operates to determine the right of the claimant as between himself and the general government.[94]

88 Belk v. Meagher, 104 U. S. 279, 284, 26 L. ed. 735, 1 Morr. Min. Rep. 510; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111, 114, 17 Morr. Min. Rep. 28; Garfield M. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153, 155; Gilpin County M. Co. v. Drake, 8 Colo. 586, 589, 9 Pac. 787, 788; Sweet v. Webber, 7 Colo. 443, 4 Pac. 752, 754.

89 Ledoux v. Forester, 94 Fed. 600, 602.

90 Gleeson v. Martin White M. Co., 13 Nev. 442, 456.

91 Donahue v. Meister, 88 Cal. 121, 131, 22 Am. St. Rep. 283, 25 Pac. 1096, 1099; McCleary v. Broaddus, 14 Cal. App. 60, 111 Pac. 125, 127; Eaton v. Norris, 131 Cal. 563, 63 Pac. 856, 21 Morr. Min. Rep. 205.

92 United States v. Castillero, 2 Black (U. S.), 17, 96, 17 L. ed. 360; Gonu v. Russell, 3 Mont. 358.

93 Gleeson v. Martin White M. Co., 13 Nev. 442, 462; Patterson v. Tarbell, 26 Or. 29, 37 Pac. 76, 78; Gird v. California Oil Co., 60 Fed. 531, 536, 18 Morr. Min. Rep. 45; Willeford v. Bell (Cal.), 49 Pac. 6; Upton v. Larkin, 7 Mont. 449, 17 Pac. 728, 731, 15 Morr. Min. Rep. 404; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1042, 19 Morr. Min. Rep. 650; Walsh v. Erwin, 115 Fed. 531, 536; Book v. Justice M. Co., 58 Fed. 106, 114, 17 Morr. Min. Rep. 617; Kern Oil Co. v. Crawford, 143 Cal. 298, 3 L. R. A., N. S., 993, 76 Pac. 1111, 1112; Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 970; Bergquist v. West Virginia & W. Copper Co., 18 Wyo. 234, 106 Pac. 673, 680.

94 Pollard v. Shively, 5 Colo. 309, 317. See, also, Drummond v. Long, 9 Colo. 538, 13 Pac. 543, 15 Morr. Min. Rep. 510.

§ 372. **Time allowed for marking.**—Under the United States laws a claim may be marked at any time prior to the acquisition of an intervening right, regardless of the question as to whether the time within which such marking was made was reasonable or not.[95] In the absence of state legislation or district regulation, it has been held, in California, that while a party in actual possession, proceeding with diligence to mark his boundaries, would be protected as against a stranger attempting to relocate, yet, strictly speaking, no time is allowed to the locator to complete his location by marking it on the surface.[96] This view is also adopted by the supreme court of Oregon.[97]

But, as heretofore indicated,[98] the circuit court of appeals for the ninth circuit, upon the same state of facts, presented in one of the California cases,[99] declined to accept the doctrine of the California courts,[100] but follows the rule announced by the supreme courts of Nevada[1] and Idaho,[2] and the manifest intent of the law as suggested by the supreme court of the United

[95] *Ante*, § 330; Crown Point G. M. Co. v. Crismon, 39 Or. 364, 65 Pac. 87, 21 Morr. Min. Rep. 406.

[96] Newbill v. Thurston, 65 Cal. 419, 4 Pac. 409, 410; Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. 401, 15 Morr. Min. Rep. 602; Pharis v. Muldoon, 73 Cal. 284, 17 Pac. 70, 71, 15 Morr. Min. Rep. 348; but see McCleary v. Broaddus, 14 Cal. App. 60, 111 Pac. 125, 126, and Stats. of Cal. 1909, p. 313; Civil Code, §§ 1426, 1426a.

[97] Patterson v. Tarbell, 26 Or. 29, 37 Pac. 76.

[98] *Ante*, § 339.

[99] Newbill v. Thurston, 65 Cal. 419, 4 Pac. 409, 410.

[100] Doe v. Waterloo M. Co., 70 Fed. 455, 17 C. C. A. 190, 18 Morr. Min. Rep. 265, affirming 55 Fed. 11, 15.

[1] Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312, 329; Gleeson v. Martin White M. Co., 13 Nev. 442.

[2] Burke v. McDonald, 2 Idaho, 646, 679, 33 Pac. 49, 50, 17 Morr. Min. Rep. 325.

States[3] and by the courts of last resort in Colorado,[4] South Dakota,[5] Washington,[6] and Montana.[7] It is unnecessary to here repeat what we have said on this subject in a preceding section.[8] For the reasons therein suggested, we are of the opinion that the rule, as announced in California and Oregon, is opposed to both the spirit of the law and the weight of authority.

§ 373. What is sufficient marking under the federal law.—As noted in the succeeding section, some of the states have enacted laws defining the character of monuments, or marks, to be placed on the ground. In the absence of such state legislation or local regulation, what constitutes a sufficient marking is a question to be determined by the jury, according to the circumstances in each particular case.[9] It naturally depends upon the conformation of the ground. What might be sufficient in the case of a comparatively level or bare surface might not answer the requirements of the law

[3] Erhardt v. Boaro, 113 U. S. 527, 535, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472.

[4] Murley v. Ennis, 2 Colo. 300; Patterson v. Hitchcock, 3 Colo. 533.

[5] Marshall v. Harney Peak Tin M. Co., 1 S. D. 350, 47 N. W. 290, 293.

[6] Union M. & M. Co. v. Leitch, 24 Wash. 585, 85 Am. St. Rep. 961, 64 Pac. 829, 830.

[7] Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1045.

[8] *Ante*, § 339.

[9] Taylor v. Middleton, 67 Cal. 656, 8 Pac. 594, 595, 15 Morr. Min. Rep. 284; Anderson v. Black, 70 Cal. 226, 11 Pac. 700, 701; Du Prat v. James, 65 Cal. 555, 4 Pac. 562, 564, 15 Morr. Min. Rep. 341; Farmington G. M. Co. v. Rhymney G. & C. Co., 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832; Eaton v. Norris, 131 Cal. 561, 63 Pac. 856, 857, 21 Morr. Min. Rep. 205; Russell v. Chumasero, 4 Mont. 309, 1 Pac. 713, 714, 15 Morr. Min. Rep. 508 (decided before act of 1895); Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153, 154; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 60 C. C. A. 155, 22 Morr. Min. Rep. 688; Charlton v. Kelly, 156 Fed. 433, 435, 84 C. C. A. 295, 13 Ann. Cas. 518.

in a mountainous region where the hills are precipitous or the surface covered with timber or undergrowth.[10]

> This requirement is not fulfilled by simply setting a post at or near the place of discovery, and setting stakes at each of the corners of the claim and at the center of the end-lines, unless the topography of the ground is such that a person accustomed to tracing the lines of mining claims can, after reading the description of the claim in the posted notice of location, by a reasonable and *bona fide* effort to do so, find all of the stakes, and thereby trace all of the lines. Where the country is broken, and the view from one corner to another is obstructed by intervening gulches and timber and brush, it is necessary to blaze the trees along the lines, or cut away the brush, or set more stakes, at such distances that they may be seen from one to another, or dig up the ground in a way to indicate the lines, so that the boundaries may be readily traced.[11]

In this view of the law, adjudicated cases are not often of controlling weight. They depend for their value as precedents upon the reasoning of the courts and the similarity as to facts existing in the case to which they are sought to be applied.

While the commissioner of the general land office has advised the erection of posts at the corners, and the erection of a signboard at the location point, the law may be satisfied by something less.[12]

We have collated the following examples, wherein the marking in the manner designated was held to satisfy the law:—

[10] Book v. Justice M. Co., 58 Fed. 106, 113; Madeira v. Sonoma Magnesite Co. (Cal. App.), 130 Pac. 175, 179.

[11] Ledoux v. Forester, 94 Fed. 600, 602; Charlton v. Kelly, 156 Fed. 433, 435, 84 C. C. A. 295, 13 Ann. Cas. 518.

[12] Gleeson v. Martin White M. Co., 13 Nev. 442, 462.

In a district where the extent of a claim on each side of the center line is established by local rule, it has been said that the object of the law is attained by marking this center line; that a man of common intelligence, acquainted with the customs of the country, seeing the discovery monument, the preliminary posted notice, and the stakes marking this center line, would be informed by the rules of the district and the laws of the land that the boundaries of the claim were formed by lines parallel to the center line, at the distance prescribed by local rules, and by end-lines at right angles thereto. With this knowledge, he could easily trace the boundaries and ascertain exactly where he could locate with safety.[13]

Judge Sawyer held that the sinking of a discovery shaft, posting a notice thereon, and placing a monument and post at *one* extremity of the linear measurement, was a compliance with the law.[14]

We think these cases stretch the law to the utmost limit of liberality. It is almost a return to the primitive rules, prevalent when the lode was the principal thing located and the surface a mere incident, when the locator could hold but one vein, and his rights as to that vein were not defined by surface boundaries.[15]

Under the existing law, a grant of the surface is sought, and the rights on the discovered lode, as well as all others whose apices may be found therein, are defined exclusively by the form of the location and the

[13] Gleeson v. Martin White M. Co., 13 Nev. 442, 463. See, also, Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439, 449, Fed. Cas. No. 9886, 9 Morr. Min. Rep. 616; Oregon King M. Co. v. Brown, 119 Fed. 48, 54, 55 C. C. A. 626, 22 Morr. Min. Rep. 414; Holdt v. Hazard, 10 Cal. App. 440, 102 Pac. 540, 541.

[14] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 311, 1 Fed. 522, 533, 9 Morr. Min. Rep. 529.

[15] *Ante*, § 58.

direction of the boundary lines. What the existing law evidently contemplates is physical evidence on the ground of *marks* which will enable one to trace the lines on the surface.[16]

Posted or recorded notices may be an aid in determining the *situs* of monuments,[17] but they cannot be substituted for all markings. They therefore constitute a part of the marking, as does every other object placed on the ground for that purpose, if in fact it does aid such result.[18]

In many cases, stakes driven into the ground are the most certain means of identification.[19]

Fencing is not necessary;[20] in fact, where in California the early occupants inclosed their ground with substantial inclosures, it was an open invitation for prospectors to enter, as it indicated a holding for agricultural purposes.

Stakes firmly planted in the ground, marked as corner stakes, with stone mounds placed around them, which stakes and mounds were found by the court to be "prominent and permanent monuments," were held to justify the legal conclusion that the location was dis-

16 Willeford v. Bell (Cal.), 49 Pac. 6, 7; Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968.

17 McKinley Creek M. Co. v. Alaska United M. Co., 183 U. S. 563, 570, 22 Sup. Ct. Rep. 84, 46 L. ed. 331, 21 Morr. Min. Rep. 730; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 214, 60 C. C. A. 155, 22 Morr. Min. Rep. 688.

18 Eaton v. Norris, 131 Cal. 561, 63 Pac. 856, 21 Morr. Min. Rep. 205; Meydenbauer v. Stevens, 78 Fed. 787, 792, 18 Morr. Min. Rep. 578; Temescal Oil & D. Co. v. Salcido, 137 Cal. 211, 69 Pac. 1010, 22 Morr. Min. Rep. 360; Walsh v. Erwin, 115 Fed. 531, 536; McCleary v. Broaddus, 14 Cal. App. 60, 111 Pac. 125, 126.

19 Hammer v. Garfield M. & M. Co., 130 U. S. 291, 299, 9 Sup. Ct. Rep. 548, 32 L. ed. 964, 16 Morr. Min. Rep. 125; Eaton v. Norris, 131 Cal. 561, 63 Pac. 856, 21 Morr. Min. Rep. 205.

20 Rogers v. Cooney, 7 Nev. 215, 219.

tinctly marked on the ground so that the boundaries could be readily traced.[21]

Stakes and stone monuments at each corner of the claim, and at the center of each of the end-lines, are, according to the supreme court of Nevada, as much as has ever been required under the most stringent construction of the law;[22] and yet there are states which require eight posts and monuments, the additional two being placed at the center of the side-lines.[23]

A location marked by a discovery monument, on which was placed the notice of location, and by a stake at each of three of the corners of the claim, and a monument at the center of each end-line, leaving one corner unmarked, was held to be sufficient to comply with the law.[24]

The omission to mark one end of a claim where the ground was so inaccessible that the surveyor, when surveying for patent, was compelled to determine the position of the end-line by triangulation, the remainder of the claim being marked by stakes and mounds at the accessible corners, the center of one end-line, a dis-

[21] Du Prat v. James, 65 Cal. 555, 4 Pac. 562, 563, 15 Morr. Min. Rep. 341; Gird v. California Oil Co., 60 Fed. 531, 537, 18 Morr. Min. Rep. 45; Book v. Justice M. Co., 58 Fed. 106, 113; Credo M. & S. Co. v. Highland M. & M. Co., 95 Fed. 911, 914.

[22] Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383. See, also, Souter v. Maguire, 78 Cal. 543, 21 Pac. 183, 184; Book v. Justice M. Co., 58 Fed. 106, 113; Howeth v. Sullenger, 113 Cal. 547, 45 Pac. 841, 842; Meydenbauer v. Stevens, 78 Fed. 787, 792, 18 Morr. Min. Rep. 578; Smith v. Newell, 86 Fed. 56, 57; Credo M. & S. Co. v. Highland M. & M. Co., 95 Fed. 911, 914; Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 584, (on rehearing) 934; Holdt v. Hazard, 10 Cal. App. 440, 102 Pac. 540, 541. The present statute of Nevada requires six stakes—one at each corner and at the side-line centers, *post*, § 374.

[23] North Dakota, South Dakota, *post*, § 374.

[24] Warnock v. De Witt, 11 Utah, 324, 40 Pac. 205; Walsh v. Erwin, 115 Fed. 531, 536.

covery monument and blazed trees on the center line, was held not to be an evasion of the law. Under the circumstances, the marking was sufficient.[25]

Posting notices on trees, one at each end of the claim,[26] or posting a notice in the center of the claim without any attempt at marking,[27] have been held to be wholly insufficient. These notices would serve the purpose for which they were originally intended, as notices of intention to locate, but would only preserve the right for a reasonable time to enable the locator to mark his boundaries.[27a]

The supreme court of the United States, in the case of McKinley Creek Mining Co. v. Alaska United Mining Co.,[28] has sustained the validity of a placer location where no attempt was made to actually mark the boundaries. All that was done was to post notices on a snag, or stump, in a creek, claiming a certain number of feet running with the creek and three hundred feet on each side of the center of the creek, and referring to the claim as the east extension of a certain named claim and the west extension of another. Unless some facts or circumstances were represented to the court which cannot be gleaned from the official report of the case, such a location would seem to fall short of the requirement that the claim shall be "distinctly

[25] Eilers v. Boatman, 3 Utah, 159, 2 Pac. 66, 69, 15 Morr. Min. Rep. 159; affirmed, 111 U. S. 356, 4 Sup. Ct. Rep. 432, 28 L. ed. 454, 15 Morr. Min. Rep. 471.

[26] Holland v. Mt. Auburn G. Q. M. Co., 53 Cal. 149, 151.

[27] Gelcich v. Moriarity, 53 Cal. 217; Morenhaut v. Wilson, 52 Cal. 263, 269; Doe v. Waterloo M. Co., 70 Fed. 455, 458, 17 C. C. A. 190, 18 Morr. Min. Rep. 265.

[27a] Text cited in Madeira v. Sonoma Magnesite Co. (Cal. App.), 130 Pac. 175, 180.

[28] 183 U. S. 563, 569, 22 Sup. Ct. Rep. 84, 46 L. ed. 331, 21 Morr. Min. Rep. 730.

marked on the ground, so that its boundaries may be readily traced.''[29]

The circuit court of appeals, ninth circuit, follows the liberal rule in this case and says that the statute does not say that the boundaries shall be indicated by physical marks nor in any particular designated manner.[30]

As intimated in a previous section, the marks, stakes, or monuments should be within the statutory limit as to area;[31] yet this rule is to be understood in the light of the doctrine that excessive locations within reasonable limitations are not wholly void, but are invalid only as to the excess.[32]

In so far as the ground taken is vacant, each location, if properly made in other respects, will be valid.[33]

The right to place marks upon claims previously appropriated has been heretofore discussed.[34]

A failure to comply with the law as to the marking within a reasonable time after discovery, where there is no local rule or state statute fixing the time, or

[29] Rev. Stats., § 2324; Comp. Stats. 1901, p. 1426; 5 Fed. Stats. Ann. 19; Rev. Stats., § 2329; Comp. Stats. 1901, p. 1432; 5 Fed. Stats. Ann. 42; *post*, § 454.

[30] Oregon King M. Co. v. Brown, 119 Fed. 48, 56, 55 C. C. A. 626, 22 Morr. Min. Rep. 414, quoting from Book v. Justice M. Co., 58 Fed. 106, 113, 17 Morr. Min. Rep. 617. See, also, Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 218, 60 C. C. A. 155, 22 Morr. Min. Rep. 688; Charlton v. Kelly, 156 Fed. 433, 435, 84 C. C. A. 295, 13 Ann. Cas. 518.

[31] Leggatt v. Stewart, 5 Mont. 107, 109, 2 Pac. 320, 321, 15 Morr. Min. Rep. 358; Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. 714.

[32] *Ante*, § 362.

[33] Doe v. Tyler, 73 Cal. 21, 14 Pac. 375, 376; West Granite Mt. M. Co. v. Granite Mt. M. Co., 7 Mont. 356, 17 Pac. 547, 548; Perigo v. Erwin, 85 Fed. 904, 905, 19 Morr. Min. Rep. 269; Crown Point M. Co. v. Buck, 97 Fed. 462, 465, 38 C. C. A. 278; McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823, 825.

[34] *Ante*, §§ 363, 363a.

within the time fixed by statute or local rule, renders the ground subject to relocation;[35] but if the ground is marked before conflicting rights accrue, the claim will be valid.[36] In case of a relocation, the right of the relocator is lost if he fails to mark his boundaries prior to the resumption of work by the former owner,[37] always assuming that the failure to perfect the location is not caused by the fraud or tortious acts of the relocator.[38] Failure to mark the boundaries within the time allowed by law or prescribed by state or local regulation cannot be taken advantage of by a subsequent locator, if the prior locator perfects his location in advance of any intervening rights.[39] A location when perfected relates back to the discovery.[40] Boundaries once established cannot be changed to the detriment of intervening locators.[41] In considering the question as to the sufficiency of marking, the court is not confined to the monuments placed at the cor-

[35] White v. Lee, 78 Cal. 593, 12 Am. St. Rep. 115, 21 Pac. 363, 17 Morr. Min. Rep. 209; Funk v. Sterrett, 59 Cal. 613.

[36] *Ante*, §§ 330, 372; Crown Point G. M. Co. v. Crismon, 39 Or. 364, 65 Pac. 87, 88, 21 Morr. Min. Rep. 406.

[37] Gonu v. Russell, 3 Mont. 358, 363; Pharis v. Muldoon, 75 Cal. 284, 17 Pac. 70, 71, 15 Morr. Min. Rep. 348; Holland v. Mt. Auburn G. Q. M. Co., 53 Cal. 149. But see *post*, § 408.

[38] Erhardt v. Boaro, 113 U. S. 527, 534, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472; Miller v. Taylor, 6 Colo. 41.

[39] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 314, 1 Fed. 522, 531, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 115, 11 Fed. 666, 676, 4 Morr. Min. Rep. 411. See *ante*, § 330.

[40] Doe v. Waterloo M. Co., 70 Fed. 455, 459, 17 C. C. A. 190, 18 Morr. Min. Rep. 265; Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. 401, 404, 15 Morr. Min. Rep. 602.

[41] O'Reilly v. Campbell, 116 U. S. 418, 422, 6 Sup. Ct. Rep. 421, 29 L. ed. 669; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312; Crœsus M. & S. Co. v. Colorado L. & M. Co., 19 Fed. 78, 81; Bigelow v. Conradt, 3 Alaska, 134, 140.

ners of the claim at the inception of the location for the purpose of marking it, but may consider also all other objects placed on the ground, either then or subsequently, prior to the subsequent location, either for the purpose of serving as monuments or otherwise.[42]

It is not necessary that the marking of the location on the ground should be done by the locator in person; such marking may be done by the agents or employees of the locator as well as by the locator himself.[43]

§ 374. State statutes defining character of marking. The following statutory requirements are found in the precious metal-bearing states and territories:—

California.—Before filing the notice of location for record (within thirty days after discovery), the locator must define the boundaries of his claim so that they may be readily traced.[44]

Colorado.—Before filing the certificate of location for record (within three months after discovery),[45] the surface boundaries must be marked by six posts, hewed or marked on the side, or sides, in toward the claim, and sunk into the ground, one at each corner, and one at the center of each side-line. If bedrock prevents the sinking of posts, the boundary may be placed on a pile of stones. Where it is impracticable (because of danger in placing or other reason) to put the post at the proper place, it may be placed at the nearest practicable point, suitably marked to designate the proper place.[46] The cutting of a letter in a

42 Eaton v. Norris, 131 Cal. 561, 63 Pac. 856, 857, 21 Morr. Min. Rep. 205.

43 Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 217, 60 C. C. A. 155, 22 Morr. Min. Rep. 688.

44 Stats. 1909, p. 313; Civ. Code, §§ 1426, 1426a.

45 Mills' Annot. Stats., § 3150; Rev. Stats. 1908, § 4194.

46 Mills' Annot. Stats., § 3153; Rev. Stats. 1908, § 4198.

solid rock will not suffice in lieu of the placing of a post.[47] These provisions cannot be invoked when the setting of the stake at the true corner is merely difficult or inconvenient.[48]

Idaho.—Within ten days from the date of discovery, the discoverer must mark his boundaries by establishing at each corner thereof, and at any angle in the side-lines, a monument of any material or form which will readily give notice, which shall be marked with the name of the claim and the corner, or angle, it represents. If the monument cannot be safely planted at the true angle, or corner, it may be placed as near thereto as practicable, and so marked as to indicate the place of such corner, or angle. If of posts or trees, the monuments must be hewn, and marked upon the side facing discovery, and must be four inches square, or in diameter. All monuments must be four feet high.[49]

Arizona.—Before filing location certificate (ninety days after location),[50] the surface boundaries must be marked by six substantial posts, projecting at least four feet above the surface of the ground, or by substantial stone monuments, at least three feet high,—to wit, one at each corner of said claim, and one at the center of each end-line thereof.[51]

[47] Taylor v. Parenteau, 23 Colo. 368, 48 Pac. 505, 18 Morr. Min. Rep. 534. See, also, Croesus M. & M. Co. v. Colorado L. & M. Co., 19 Fed. 78, 79.

[48] Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 953, 20 Morr. Min. Rep. 591.

[49] Rev. Stats., § 3101, as amended—Laws 1895, p. 27, § 2; Laws 1899, p. 633; Civ. Code 1901, § 2557; Rev. Code 1907, § 3207. See Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955, 958, 22 Morr. Min. Rep. 69.

[50] Rev. Stats. 1887, § 2349; Id. 1901, § 3234; Amd. 1909, p. 157.

[51] Rev. Stats. 1901, § 3236. This statute is discussed in Wiltsee v. King of Arizona M. & M. Co., 7 Ariz. 95, 60 Pac. 896, 897.

Montana.—Within thirty days after posting the notice the locator shall mark the location on the ground so that its boundaries can be readily traced. It shall be *prima facie* evidence that the location is properly marked if the boundaries are defined by a monument at each corner or angle of the claim consisting of any of the following kinds: (1) A tree at least eight inches in diameter and blazed on four sides. (2) A post at least four inches square by four feet six inches in length set one foot in the ground unless solid rock should occur at a less depth, in which case the post should be set upon such rock and surrounded in all cases by a mound of earth or stone at least four feet in diameter by two feet in height. A square stump of the requisite size surrounded by such mound shall be deemed the equivalent of a post and mound. (3) A stone at least six inches square by eighteen inches in length, set two-thirds of its length in the ground, with a mound of earth or stone alongside at least four feet in diameter by two feet in height; or (4) a boulder at least three feet above the natural surface of the ground on the upper side.

Where other monuments or monuments of lesser dimensions than those above described are used, it shall be a question for the jury, or for the court if the case is tried without a jury, as to whether the location has been marked so that its boundaries can be readily traced. Whatever monument is used, it must be marked with the name of the claim and the description of the corner either by number or cardinal point.[52]

[52] Rev. Pol. Code 1895, §§ 3610, 3611; amended, Laws 1901, p. 140; amended, Laws 1907, p. 18; Rev. Code 1907, § 2283. The provisions of this section as it stood prior to its amendment in 1907 were held to be mandatory. Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153, 154; Hahn v. James, 29 Mont. 1, 73 Pac. 965, 966. Obviously the amended law gives the locator the option of following the statute and

Nevada.—Within twenty days from the date of posting the notice of location the locator shall define the boundaries of the claim by placing at each corner and the center of each side-line one of the following described monuments: (1) Removing the top of a tree (having a diameter of not less than four inches) not less than three feet above the ground, and blazing and marking the same. (2) Rock in place capping such rock with smaller stones, such rock and stones to have a height of not less than three feet. (3) Posts or stone one at each corner of the claim and one at the center of each side-line. Posts must be at least four inches in diameter by four and one-half feet in length, set one foot in the ground. Where it is practically impossible, on account of bedrock or precipitous ground, to sink such posts, they may be placed in a mound of earth or stones or when the proper placing of such posts or other monuments is impracticable or dangerous to life or limb, it shall be lawful to place such posts or monuments at the nearest point properly marked to designate its right place. When a stone is used (not rock in place), it must be not less than six inches in diameter and eighteen inches in length set two-thirds of its length in the top of a mound of earth or stone, four feet in diameter and two and one-half feet in height. All trees, posts or rocks used as monuments, when not four feet in diameter at the base, shall be surrounded by a mound of earth or stone four feet in diameter by two feet in height. All trees, posts, stones or rock monuments must be so marked as to designate the corners of the claim located.[53]

receiving the benefit of the presumption flowing from a compliance with it, or taking his chances before the court or a jury as to the sufficiency of the marking.

[53] Comp. Laws 1900, § 209; amended, Laws 1901, p. 97; Laws 1907, p. 418; Rev. Laws 1912, § 2423.

New Mexico.—No time is provided within which marking is to be effected. Ninety days are allowed to sink discovery shaft and three months to record copy of notice of location. The inference is plausible that the locator should be allowed to complete his development work before marking his boundaries.[54] In any event, he is allowed a reasonable time. Surface boundaries are to be marked by four substantial posts or monuments, one at each corner of the claim, so as to distinctly mark the claim on the ground, so that its boundaries can be readily traced.[55]

North Dakota.—Before filing the certificate of location for record (sixty days from date of discovery), the boundaries shall be marked by eight substantial posts, hewed, or blazed, on the side facing the claim, and marked with the name of the lode and the corner, end, or side of the claim that they respectively represent, and sunk into the ground as follows: One at the corner, and one at the center of each side-line, and one at each end of the lode; but when it is impracticable, on account of rock or precipitous ground, to sink such posts, they may be placed in a monument of stone.[56]

Oregon.—Within thirty days after posting of the notice of location the boundaries shall be marked by six substantial posts, projecting not less than three feet above the surface of the ground, and not less than four inches square or in diameter, or by substantial mounds of stone or earth and stone, at least two feet in height,—to wit, one such post or mound of rock at each corner and at the center ends of such claims.[57]

[54] *Ante*, § 372.

[55] Comp. Laws 1897, § 2299; amended, Laws 1899, p. 111.

[56] Rev. Code 1895, §§ 1428, 1430, 1431; Id. 1899, §§ 1428, 1430, 1431; Id. 1905, §§ 1802, 1804, 1805.

[57] Laws 1898, p. 16, as amended—Laws 1901, p. 140; Bellinger & Cotton's Code, § 3975; Lord's Or. Laws, § 5128; Wright v. Lyons, 45

South Dakota.—Same as North Dakota.[58]

Utah.—Mining claims must be distinctly marked on the ground, so that the boundaries thereof can be readily traced. No time is fixed within which this should be done. The sinking of a discovery shaft is not required. The locator would therefore be allowed a reasonable time to mark his boundaries.[59]

Washington.—The locator is required to record a notice of location within ninety days from the date of discovery, and before filing the same for record must mark the surface boundaries of the claim by placing substantial posts or stone monuments, bearing the name of the lode and date of location; one post or monument must appear at each corner of said claim; such posts or monuments must be not less than three feet high. If posts are used, they shall be not less than four inches in diameter and shall be set in the ground in a substantial manner. If the claim is on ground, wholly or partly covered with brush or trees, such brush shall be cut and trees marked, or blazed, to indicate the lines of such claim.[60]

Wyoming.—Substantially the same as Colorado.[61]

While the requirements of these several laws should be fulfilled to a reasonable degree, a substantial compliance, where the good faith of the locator is manifest,

Or. 167, 77 Pac. 81, 82; Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 221, 7 L. R. A., N. S., 791.

[58] Comp. Laws Dak. 1887, § 2002. Adopted by South Dakota—Laws 1890, ch. cv.; Grantham's Annot. Stats. S. D., § 2661; Rev. Pol. Code (1903), § 2537.

[59] Laws 1899, p. 26, § 3; Comp. Laws 1907, § 1497.

[60] Laws 1899, p. 69; Rem. & Bal. Codes 1909, § 7359.

[61] Laws 1888, p. 88, § 17; Rev. Stats. 1899, § 2548; Comp. Stats. 1910, § 3469.

would undoubtedly be held sufficient. Such statutes are, as a rule, liberally construed. Slight variations should not be permitted to invalidate a location otherwise valid.[62]

§ 375. Perpetuation of monuments. — Under the rules and customs governing the rights of tin bounders in Cornwall, bounds were required to be renewed annually, in default of which the estate was subject to reentry by others.[63]

These bounds, however, were marked, and possession delivered after proceedings had in the stannary courts, the writ of possession being executed by the court bailiff.

The "gales" of the free miner, in the coal and iron mines of the Forest of Dean, were set out and marked by the gaveler of the forest;[64] and among the lead miners of Derbyshire, the "meers" were measured by the bar-master, an agent of the crown, in conjunction with two of the grand jury.[65]

In Mexico, the boundaries were marked, after measurement, by an agent of the mining deputation, who was usually a skilled engineer, and the miner was called upon to enter into an obligation to "keep and observe them forever."[66]

These methods of establishing boundaries, succeeding, as they did, a formal adjudication as to the right to

[62] Walker v. Pennington, 27 Mont. 369, 71 Pac. 156, 158. But see Croesus M. & M. Co. v. Colorado L. & M. Co., 19 Fed. 78, 79; Taylor v. Parenteau, 23 Colo. 368, 48 Pac. 505, 506, 18 Morr. Min. Rep. 534.

[63] *Ante*, § 5.

[64] *Ante*, § 7.

[65] *Ante*, § 8.

[66] *Ante*, § 13, p. 21.

possession, suggest the propriety of permanency. In the United States, however, we are required to mark our boundaries first, and determine our right to possession afterward. Even when a survey for patent is made, the deputy mineral surveyor is an agent of the claimant, and his acts in no sense bind the government,[66a] and, as we shall observe when dealing with patent proceedings, surveys are made, in the first instance, of the ground *claimed*, regardless of overlapping surfaces or interference with prior surveys or locations. Relative rights arising out of these conflicts are frequently not determined until after long litigation. Therefore, there would be but little use in compelling the erection of indestructible monuments for the purpose of marking the extent of the ground *claimed*. Ordinary prudence will suggest to the locator the advisability of preserving his marks. A failure to so preserve them exposes the owners to hazards incurred by death of locators and witnesses and other circumstances which might prevent the fact of marking from being established. Owners should therefore use reasonable diligence in preserving and restoring their boundary monuments. No presumptions flowing from the antiquity of the location will be indulged in as to the original marking, as against a hostile claimant.[67] But the law does not require monuments to be perpetuated. Therefore, it has been held that where a mining claim is once sufficiently marked on the ground, and all other necessary acts of location are performed, a right vests in the locator, which cannot be divested by the subse-

[66a] The United States supreme court has said, however, that "the work which they do is the work of the government, and the surveys which they make are its surveys." Waskey v. Hammer, 223 U. S. 85, 32 Sup. Ct. Rep. 187, 56 L. ed. 359.

[67] Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 970.

quent obliteration of the marks or removal of the stakes without the fault of the locator.[68]

Where the evidence shows that the boundaries were originally marked, the fact that the stakes then set could not in later years be found raises no presumption against the validity of the original marking.[69]

The supreme court of Colorado suggests a sensible exception to this rule: Where there is a variation between the calls of the recorded location certificate and the monuments established on the ground, the locator, in order to avail himself of the rule of law which gives controlling effect to the monuments as they were placed on the ground, must keep up his markings. The reason given in support of this is, that as the erroneous record fails to give constructive notice, if the monuments are swept away, no search, no exercise of prudence, diligence, or intelligence, would advise the subsequent locator of the extent and limits of the prior appropriation,[70] and this is one of the principal objects of marking. The rule that monuments shall control courses and distances is recognized only in cases where the monuments are clearly ascertained. If there be doubt as to monuments, as well as to the course and

68 Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 110, 11 Fed. 666, 677, 4 Morr. Min. Rep. 411; Book v. Justice M. Co., 58 Fed. 106, 114, 17 Morr. Min. Rep. 617; McEvoy v. Hyman, 25 Fed. 596, 598, 15 Morr. Min. Rep. 397; Smith v. Newell, 86 Fed. 56, 57; Yreka M. Co. v. Knight, 133 Cal. 544, 65 Pac. 1091, 1093, 21 Morr. Min. Rep. 478; Walsh v. Erwin, 115 Fed. 531, 537; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 217, 60 C. C. A. 155, 22 Morr. Min. Rep. 688; Tonopah & Salt Lake M. Co. v. Tonopah M. Co., 125 Fed. 389, 391.

69 Temescal Oil & D. Co. v. Salcido, 137 Cal. 211, 69 Pac. 1010, 22 Morr. Min. Rep. 360.

70 Pollard v. Shively, 5 Colo. 309, 318; Duncan v. Eagle Rock G. M. & R. Co., 48 Colo. 569, 139 Am. St. Rep. 288, 111 Pac. 588, 593.

distance, there can be no reason for saying that monuments shall prevail, rather than the course.[71]

Article VIII. The Location Certificate and Its Contents.

§ 379. The location certificate—Its purpose.
§ 380. State legislation as to contents of location certificate.
§ 381. Rules of construction applied.
§ 382. Variation between descriptive calls in certificate and monuments on the ground.
§ 383. "Natural objects" and "permanent monuments."
§ 384. Effect of failure to comply with the law as to contents of certificate.
§ 385. Verification of certificates.

§ 379. The location certificate—Its purpose.—In speaking of the "location certificate," we have no reference to the preliminary posted notice of discovery and intention to locate, discussed in a preceding article,[72] except in so far as such posted notice forms the basis of the recorded notice, as it does in Arizona, California, Oregon and Utah.[73] In this latter class of cases, the posted notice performs the function of a certificate of location, as it is termed in most states, the recorded notice being either a copy of or substantially conforming to the posted notice.[74]

[71] Thallmann v. Thomas, 102 Fed. 935, 936; Christman v. Simmons, 47 Or. 184, 82 Pac. 805, 807; Resurrection G. M. Co. v. Fortune G. M. Co., 129 Fed. 668, 771, 64 C. C. A. 180; Treadwell v. Marrs, 9 Ariz. 333, 83 Pac. 350, 355; Duncan v. Eagle Rock G. M. & R. Co., 48 Colo. 569, 139 Am. St. Rep. 288, 111 Pac. 588, 593; *post*, §§ 382, 778.

[72] *Ante*, §§ 350–356.

[73] *Ante*, § 353.

[74] Oregon King M. Co. v. Brown, 119 Fed. 48, 57, 55 C. C. A. 626, 22 Morr. Min. Rep. 414; Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931, 932.

By the term "certificate of location," we mean the instrument prepared by the locator after the completion of the development work and the marking of his location, which certificate is required by the state laws or local rules to be recorded.[75] This instrument when recorded is a statutory writing affecting realty, being, in the states or localities where it is required, the basis of the miner's "right of exclusive possession" of his mining location granted by the laws of congress.[76] It is the first muniment of his paper title, upon the record of which proceedings for patent are based, and as recorded is intended to impart constructive notice to all subsequent locators of the existence of the claim, its precise locality and extent,[77] as the marking of the location on the ground is intended to impart actual notice of these facts. The preliminary posted notice performs a temporary function; the recorded certificate a more permanent one.[78] This recorded certificate, notice, or declaratory statement, by whatever name it may be called, is the genesis of the locator's paper title.

The congressional laws do not in terms require any such certificate, but they provide that. where a record of the location is made, such record "shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent

[75] The distinction between a notice of location to be posted and a certificate of location to be recorded is stated in Peters v. Tonopah M. Co., 120 Fed. 587, 589; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1046, 19 Morr. Min. Rep. 650.

[76] Pollard v. Shively, 5 Colo. 309, 312.

[77] Magruder v. Oregon & Cal. R. R. Co., 28 L. D. 174.

[78] Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1046, 19 Morr. Min. Rep. 650; Gird v. California Oil Co., 60 Fed. 531, 536, 18 Morr. Min. Rep. 45.

monument, as will identify the claim."[79] In the absence of a state law or local rule requiring a record to be made, congress has not undertaken to prescribe the nature of the notices which a miner may be compelled by such laws or rules to post, or which he may see fit to post on his own motion. It is only when such notice, or its equivalent, is required to be recorded that the provisions of the federal law become mandatory.[80]

Where state laws or local rules require a record to be made, the recorded instrument must contain at least the elements provided for by the Revised Statutes,[81] and if such state laws or local rules prescribe the contents of such recorded notice, it must comply with this additional requirement.[82]

[79] Rev. Stats., § 2324.

[80] Gleeson v. Martin White M. Co., 13 Nev. 443, 464; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 112, 11 Fed. 666, 678, 4 Morr. Min. Rep. 411; Poujade v. Ryan, 21 Nev. 449, 33 Pac. 659, 660; Doe v. Waterloo C. M. Co., 55 Fed. 11, 13; Erhardt v. Boaro, 113 U. S. 527, 536, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472.

[81] Brown v. Levan, 4 Idaho, 794, 46 Pac. 661, 662 (but see Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955, 957, 22 Morr. Min. Rep. 69); Drummond v. Long, 9 Colo. 538, 13 Pac. 543, 544, 15 Morr. Min. Rep. 510; Faxon v. Barnard, 4 Fed. 702, 704, 2 McCrary, 44, 9 Morr. Min. Rep. 515; Gilpin County M. Co. v. Drake, 8 Colo. 586, 9 Pac. 787, 788; Darger v. Le Sieur, 8 Utah, 160, 30 Pac. 363, 364; S. C., on rehearing, 9 Utah, 192, 33 Pac. 701; Dillon v. Bayliss, 11 Mont. 171, 27 Pac. 725; Russell v. Chumasero, 4 Mont. 309, 1 Pac. 713, 15 Morr. Min. Rep. 508 (this case commented on in Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153); Garfield M. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153, 155; Hammer v. Garfield M. & M. Co., 130 U. S. 291, 9 Sup. Ct. Rep. 548, 32 L. ed. 964, 16 Morr. Min. Rep. 125; Poujade v. Ryan, 21 Nev. 449, 33 Pac. 659, 660; Gleeson v. Martin White M. Co., 13 Nev. 443; Smith v. Newell, 86 Fed. 56, 57; Meydenbauer v. Stevens, 78 Fed. 787, 792, 18 Morr. Min. Rep. 578; Deeney v. Mineral Creek M. Co., 11 N. M. 279, 67 Pac. 724, 725, 22 Morr. Min. Rep. 47; Baker v. Butte City Water Co., 28 Mont. 222, 104 Am. St. Rep. 683, 72 Pac. 617, 618; Butte City Water Co. v. Baker, 196 U. S. 119, 124, 25 Sup. Ct. Rep. 211, 49 L. ed. 409; Mares v. Dillon, 30 Mont. 117, 75 Pac. 963, 965.

[82] Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153, 154.

A few of the states provide for a record, but do not prescribe the contents of the notice or certificate to be recorded. In such cases compliance with the federal law is all that is necessary. Most of the states, however, within the purview of this treatise have provided by law for the contents of such instruments. Before proceeding with a discussion of the nature of these certificates it is advisable to present an outline of the state legislation upon the subject.

§ 380. State legislation as to contents of location certificate.—

California requires a copy of the posted notice to be recorded, which notice must contain (1) the name of the lode; (2) the name of the locator; (3) the number of linear feet claimed in length along the course of the vein, each way from the point of discovery, with the width on each side of the center of the claim, and the general course of the vein or lode as near as may be; (4) the date of the location; (5) such a description of the claim by reference to some natural object or permanent monument as will identify the claim located.[83]

Colorado.—The location certificate must contain: (1) name of the lode; (2) name of locator; (3) date of location; (4) number of feet in length claimed on each side of the center of discovery shaft; (5) the general course of the lode;[84] (6) a description of the claim sufficient to identify it.[85]

[83] Civ. Code, § 1426.

[84] Mills' Annot. Stats., § 3150; Gen. Stats. 1883, p. 722; Rev. Stats. 1908, § 4194.

[85] Mills' Annot. Stats., § 3151; Gen. Stats. 1883, p. 722; Rev. Stats. 1908, § 4195. See Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244, 246, 20 Morr. Min. Rep. 522.

Idaho.—The laws of Idaho provide for two notices: one preliminary, to be posted only; the other a final one, to be both posted and recorded.[86] The final notice must contain: (1) name of locator; (2) name of the claim; (3) date of discovery; (4) direction and distance claimed along the ledge from the discovery; (5) distance claimed on each side of the middle of the ledge; (6) distance and direction from discovery monument to some natural object by which the claim may be identified; (7) name of mining district, county, and state.[87]

Arizona.—The notice or certificate of location, which is copy of the posted notice, must contain: (1) name of the claim; (2) name of locator; (3) date of location; (4) length and width of the claim in feet, and number of feet claimed on each side of point of discovery to each end of the claim; (5) general course of the claim; (6) the locality of the claim with reference to some natural object or permanent monument as will identify the claim.[88]

Montana.—The instrument which is to be recorded is called the "certificate of location." It must contain: (1) name of lode or claim; (2) name of locator; (3) date of location, and such a description with reference to natural objects or permanent monuments as will identify the claim; (4) the direction and distance claimed along the course of the vein each way from discovery shaft, cut or tunnel, with the width on each

[86] *Ante*, § 354.

[87] Laws 1895, p. 25, § 2, as amended—Laws 1899, p. 633; Civ. Code 1901, § 2557; Laws 1895, p. 26; Laws 1899, p. 633; Rev. Code 1907, § 3207. See Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955, 957, 22 Morr. Min. Rep. 69; explaining Clearwater Shortline Ry. v. San Garde, 7 Idaho, 106, 61 Pac. 137, 138; Brown v. Levan, 4 Idaho, 794, 46 Pac. 661, 662.

[88] Rev. Stats. 1901, §§ 3232, 3234; amended Stats. 1909, p. 157. See Wiltsee v. King of Arizona M. & M. Co., 7 Ariz. 95, 60 Pac. 896, 897.

side of the center of the vein. The locator and claimant may at his option also set forth in the certificate a description of the discovery work, the corner monuments and the markings thereon, and any other facts showing a compliance with the provisions of the law. The certificate of location must be verified by the oath of a locator, or one of the locators, and, in case of a corporation, by a duly authorized officer. A certificate of location so verified, or a certified copy thereof, is *prima facie* evidence of all facts properly recited therein.[89]

The statute, with the exception of the optional clauses, is mandatory, and a substantial compliance with its provisions is necessary to perfect a valid location.[90]

Nevada.—Within ninety days after the date of posting the notice the locator must record a location certificate which shall contain: (1) the name of the lode or vein; (2) the name of the locators; (3) the date of the location and such description of the location of the claim with reference to some natural object or permanent monument as will identify the claim; (4) the number of linear feet claimed in length along the course of the vein each way from the point of discovery with the width on each side of the center of the vein and the general course of the lode or vein as near as may be; (5) the dimensions and location of the discovery

[89] Rev. Pol. Code 1895, § 3612, as amended—Laws 1901, p. 141, § 2; Stats. 1907, p. 18; Rev. Code 1907, § 2284.

[90] Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153, 154. See, also, Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1041, 19 Morr. Min. Rep. 650; Walker v. Pennington, 27 Mont. 369, 71 Pac. 156; Hahn v. James, 29 Mont. 1, 73 Pac. 965, 966; Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 86, 68 L. R. A. 833, and note; Dolan v. Passmore, 34 Mont. 277, 85 Pac. 1034, 1035; Helena Gold & Iron Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455, 457; Butte Consol. M. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 303, 90 Pac. 177; Giberson v. Tuolumne Copper Co., 41 Mont. 396, 109 Pac. 974, 975.

shaft or its equivalent, sunk upon the claim; (6) the location and description of each corner with the markings thereon.[91]

New Mexico.—A copy of the posted notice is required to be recorded. This must contain: (1) the names of the locators; (2) the intent to locate the claim; (3) a description by reference to some natural object or permanent monument.[92]

North Dakota.—The location certificate must contain: (1) name of lode; (2) name of locator; (3) date of location; (4) number of feet in length claimed on each side of the discovery shaft; (5) number of feet in width claimed on each side of lode; (6) general course of lode as near as may be;[93] (7) such a description as shall identify the claim with reasonable certainty.[94]

Oregon.—The location notice to be recorded is a copy of the one posted, which must contain: (1) name of the lode or claim; (2) name of locator; (3) date of location; (4) number of linear feet claimed along the lode each way from the point of discovery with the width on each side of the lode; (5) the general course or strike of the vein as nearly as may be with reference to some natural object or permanent monument in the vicinity thereof.[95]

91 Comp. Laws 1900, § 210; amended, Laws 1907, p. 420; Rev. Laws 1912, § 2424.

92 Comp. Laws 1884, § 1566; Id. 1897, § 2286; *ante*, § 353. Under this statute posting and discovery must be contemporaneous, no appreciable time being allowed between the discovery and the posting of the statutory notice. Moreover, the notice must be such as, when recorded, will fulfill the requirements of the federal statute.

93 Rev. Code 1895, § 1428; Id. 1899, § 1428; Id. 1905, § 1802.

94 Rev. Code 1895, § 1429; Id. 1899, § 1429; Id. 1905, § 1803.

95 Laws 1898, p. 16, as amended—Laws 1901, p. 140; Bellinger & Cotton's Code, §§ 3975, 3976; Lord's Or. Laws, §§ 5128, 5129.

South Dakota.—The requirements as to certificate of location are the same as in North Dakota.[96]

Utah.—The requirements as to the contents of the location notice are substantially the same as those of Oregon.[97]

Washington.—The location notice is required to contain: (1) name of locator; (2) date of location; (3) number of feet in length claimed on each side of the discovery; (4) the general course of the lode; (5) such a description by reference to natural objects or permanent monuments as will identify the claim.[98]

Wyoming.—The certificate must contain: (1) name of the lode; (2) name of the locator or locators; (3) date of location; (4) length of claim along the vein, measured from center of discovery shaft, and general course of the vein as far as known; (5) amount of surface ground claimed on either side of the center of the discovery shaft or workings; (6) a description of the claim by such designation of natural or fixed objects as will identify the claim beyond question.[99]

[96] Comp. Laws 1887, §§ 1999, 2000. Adopted by South Dakota—Laws 1890, ch. cv, § 1; Grantham's Annot. Stats. S. D. 1899, § 2658, as amended—Laws 1899, p. 146; Rev. Pol. Code 1903, § 2534; amended, Laws 1903, p. 268.

[97] Laws 1899, p. 26; Comp. Laws 1907, §§ 1496, 1498; amended, Stats. 1909, p. 79.

[98] Ballinger's Supp. 1901, § 3151a; Rem. & Bal. Codes 1909, § 7358. Statute held valid and obligatory, Knutson v. Fredlund, 56 Wash. 634, 106 Pac. 200.

[99] Session Laws 1890–91, ch. xlvi, pp. 179, 180, amended—Laws 1895, ch. cviii, § 1; Rev. Stats. 1899, § 2546; Comp. Stats. 1910, § 3467. Statute held valid and mandatory, Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36, 39. For a notice held sufficient under this section, see Columbia Copper Co. v. Duchess M. & M. Co., 13 Wyo. 244, 79 Pac. 385, 386; Bergquist v. West Virginia and Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673, 677.

§ 381. **Rules of construction applied.**—In the initiation of rights upon public mineral lands, as well as in the various steps taken by the miner to perfect his location, his proceedings are to be regarded with indulgence, and the notices required invariably receive at the hands of the courts a liberal construction.[100] The mining laws are "to be expounded with as little differentiation as may be between former known actual customs of miners and the formulated expressions of congress based upon those customs in present positive law."[1]

> The courts always construe these notices liberally, and if by any intendment the proof can be reconciled and made consistent with the statement contained in them, the jury will be allowed to say whether or not, upon the whole proof, the identification is sufficient.[2]

To hold the locator to absolute technical strictness in all the minor details would be practically to defeat the

[100] Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361, 363; Farmington G. M. Co. v. Rhymney G. & C. Co., 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832, 833; Fissure M. Co. v. Old Susan M. Co., 22 Utah, 438, 63 Pac. 587, 588, 21 Morr. Min. Rep. 125; Wiltsee v. King of Arizona M. & M. Co., 7 Ariz. 95, 60 Pac. 896, 898; Talmadge v. St. John, 129 Cal. 430, 62 Pac. 79, 80, 21 Morr. Min. Rep. 13; Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955, 957, 22 Morr. Min. Rep. 69; Columbia Copper M. Co. v. Duchess M. Co., 13 Wyo. 244, 79 Pac. 385, 387; Londonderry M. Co. v. United Gold Mines Co., 38 Colo. 480, 88 Pac. 455, 457; Bismark Mt. G. M. Co. v. North Sunbeam G. Co., 14 Idaho, 516, 95 Pac. 14, 17; Oregon King M. Co. v. Brown, 119 Fed. 48, 55 C. C. A. 626, 22 Morr. Min. Rep. 414; Zerres v. Vanina, 134 Fed. 610, 616; S. C., in error, 150 Fed. 564, 80 C. C. A. 366; Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931, 932; Snowy Peak Min. Co. v. Tamarack & Chesapeak M. Co., 17 Idaho, 630, 107 Pac. 60, 63; Flynn Group M. Co. v. Murphy, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851, 855, 1 Water & Min. Cas. 619; Prince of Wales Lode, 2 Copp's L. O. 2, 3.

[1] Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 19 Morr. Min. Rep. 650.

[2] Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 20 Morr. Min. Rep. 103.

manifest end and object of the law. The pioneer prospector, as a rule, is neither a lawyer nor a surveyor. Neither mathematical precision as to measurement nor technical accuracy of expression in the preparation of notices is either contemplated or required.[3] The law being designed for the encouragement and benefit of the miners should be liberally interpreted,[4] "looking to substance, rather than shadow, and should be administered on the lines of obvious common sense."[5] Mere imperfections in the certificate will not render it void.[6]

As was said by the supreme court of Utah,—

> If by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient.[7]

[3] Book v. Justice M. Co., 58 Fed. 106, 115, 17 Morr. Min. Rep. 617; Smith v. Newell, 86 Fed. 56; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1047, 19 Morr. Min. Rep. 650; Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300, 302; Farmington G. M. Co. v. Rhymney G. & C. Co., 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832, 834; Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955, 958, 22 Morr. Min. Rep. 69; Kern Oil Co. v. Crawford, 143 Cal. 298, 76 Pac. 1111, 1112, 3 L. R. A., N. S., 993; Bonanza Cons. M. Co. v. Golden Head M. Co., 29 Utah, 159, 80 Pac. 736, 738; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 215, 60 C. C. A. 155, 22 Morr. Min. Rep. 688; Tonopah & Salt Lake M. Co. v. Tonopah M. Co., 125 Fed. 389, 392; Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931, 932.

[4] Meydenbauer v. Stevens, 78 Fed. 787, 792, 18 Morr. Min. Rep. 578; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1046, 19 Morr. Min. Rep. 650; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 872, 20 Morr. Min. Rep. 103.

[5] Cheesman v. Hart, 42 Fed. 98, 99, 16 Morr. Min. Rep. 265.

[6] Bennett v. Harkrader, 158 U. S. 441, 443, 15 Sup. Ct. Rep. 863, 39 L. ed. 1046, 18 Morr. Min. Rep. 224; Farmington G. M. Co. v. Rhymney G. & C. Co., 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832, 833; Wells v. Davis, 22 Utah, 322, 62 Pac. 3, 4, 21 Morr. Min. Rep. 1; Walker v. Pennington, 27 Mont. 369, 71 Pac. 156; Webb v. Carlon, 148 Cal. 555, 113 Am. St. Rep. 305, 83 Pac. 998.

[7] Wells v. Davis, 22 Utah, 322, 62 Pac. 3, 4, 21 Morr. Min. Rep. 1; Bonanza Cons. M. Co. v. Golden Head M. Co., 29 Utah, 159, 80 Pac.

Whether the notice conforms to the statutory requirement is a question of fact, not of law.[8]

If the court cannot say from an inspection of the notice that the description is an impossible one, it may be admitted in evidence.[9]

An error of description which is obvious is harmless, if there is sufficient in the notice to enable the next comer to determine the *locus* of the claim.[10]

In matters of description, calls that are erroneous will not destroy the validity of the notice or certificate, if by excluding them a sufficient description remain to enable its application to be ascertained.[11]

Thus, where a certificate of a location specified its *situs* as being in the wrong county, it being otherwise valid, and having been recorded in the right county, the erroneous statement was mere surplusage, and as such was rejected.[12]

736, 738; Bismark Mt. Gold M. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 Pac. 14, 17; Tiggeman v. Mrzlak, 40 Mont. 19, 105 Pac. 77, 80; Snowy Peak M. Co. v. Tamarack & Chesapeak M. Co., 17 Idaho, 630, 107 Pac. 60, 63; Flynn Group M. Co. v. Murphy, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851, 855, 1 Water & Min. Cas. 619; Street v. Delta M. Co., 42 Mont. 371, 112 Pac. 701, 705.

[8] Bismark Mt. G. M. Co. v. North Sunbeam G. M. Co., 14 Idaho, 516, 95 Pac. 14, 19.

[9] Snowy Peak M. Co. v. Tamarack & Chesapeak M. Co., 17 Idaho, 630, 107 Pac. 60, 63.

[10] Sturtevant v. Vogel, 167 Fed. 448, 453, 93 C. C. A. 84. For apt illustration of this principle, see Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931.

[11] Duryea v. Boucher, 67 Cal. 141, 7 Pac. 421, 422; Smith v. Newell, 86 Fed. 56, 57; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 871, 20 Morr. Min. Rep. 103; Mitchell v. Hutchinson, 142 Cal. 404, 76 Pac. 55; Kern Oil Co. v. Crawford, 143 Cal. 298, 76 Pac. 1111, 1112, 3 L. R. A., N. S., 993; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 281; Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931, 933.

[12] Metcalf v. Prescott, 10 Mont. 283, 25 Pac. 1037, 1 Morr. Min. Rep. 137. Note the difference in case of notice of application for patent where this defect would render such notice void. Wright v. Sioux Cons. M. Co., 29 L. D. 154; S. C., 29 L. D. 289.

An error in the date of the location specified in the notice does not prevent the locator from showing the true date.[13]

In the absence of a local requirement to that effect, the certificate need not state either the district, county, or state in which the location is situated.[14]

And where a state statute requires two notices, one preliminary, and the other final, if the former contained the name of the county, and the final one omitted it, but refers to the preliminary notice, the defect is cured.[15]

The position of the monuments as built upon the ground may be described in such a way as to direction as to be confusing. But if the other statutory requirements were complied with, the notice would be sufficiently correct to allow its admission in evidence.[16]

A mistake in the certificate as to the direction and course, such as "northerly" instead of "northeasterly," the description being aided by monuments on the ground, is of no moment.[17]

The certificate is not required to show the precise boundaries of the claim as marked on the ground, but it is sufficient if it contains directions, which, taken in connection with such boundaries, will enable a person

[13] Webb v. Carlon, 148 Cal. 555, 113 Am. St. Rep. 305, 83 Pac. 998.

[14] Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361, 363.

[15] Talmadge v. St. John, 129 Cal. 430, 62 Pac. 79, 80.

[16] Kinney v. Fleming, 6 Ariz. 263, 56 Pac. 723, 20 Morr. Min. Rep. 13; Providence G. M. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641, 19 Morr. Min. Rep. 625; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 20 Morr. Min. Rep. 103.

[17] Book v. Justice M. Co., 58 Fed. 106, 115, 17 Morr. Min. Rep. 617; Meydenbauer v. Stevens, 78 Fed. 787, 792, 18 Morr. Min. Rep. 578; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1046, 19 Morr. Min. Rep. 650; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 871, 20 Morr. Min. Rep. 103; Wiltsee v. King of Arizona M. Co., 7 Ariz. 95, 60 Pac. 896, 898; Gibson v. Hjul, 32 Nev. 360, 108 Pac. 759, 762.

of reasonable intelligence to find the claim and trace the lines.[18]

The object of any notice at all being to guide the subsequent locator and afford him information as to the extent of the claim of the prior locator, whatever does this fairly and reasonably should be held to be a good notice.[19] Great injustice would follow if, years after a miner had located a claim and taken possession, and worked upon it in good faith, his notice of location were to be subject to any very nice criticism.[20]

[18] Brady v. Husby, 21 Nev. 453, 33 Pac. 801; Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244, 248, 20 Morr. Min. Rep. 522; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 871, 20 Morr. Min. Rep. 103; Smith v. Newell, 86 Fed. 56; Kinney v. Fleming, 6 Ariz. 263, 56 Pac. 723, 724, 20 Morr. Min. Rep. 13; Providence G. M. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641, 645, 19 Morr. Min. Rep. 625; Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955, 958, 22 Morr. Min. Rep. 69; Gamer v. Glenn, 8 Mont. 371, 20 Pac. 654, 657; Upton v. Larkin, 7 Mont. 449, 17 Pac. 728, 730, 15 Morr. Min. Rep. 404; Flavin v. Mattingly, 8 Mont. 242, 19 Pac. 384, 385; Mitchell v. Hutchinson, 142 Cal. 404, 76 Pac. 55.

The adoption in Montana of a more exacting law (Pol. Code of 1895, § 3612—amended, Stats. 1901, p. 140; Stats. 1907, p. 18; Rev. Code (1907) § 2284) has rendered the earlier Montana cases inapplicable in that state. Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153, 154; Baker v. Butte City Water Co., 28 Mont. 222, 104 Am. St. Rep. 683, 72 Pac. 617, 618; Butte City Water Co. v. Baker, 196 U. S. 119, 127, 25 Sup. Ct. Rep. 211, 49 L. ed. 409; Dolan v. Passmore, 34 Mont. 277, 85 Pac. 1034, 1035; Helena Gold & Iron Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455, 457. And see Clearwater etc. Ry. Co. v. San Garde, 7 Idaho, 106, 61 Pac. 137, 138; Brown v. Levan, 4 Idaho, 794, 46 Pac. 661 (explained in Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955, 22 Morr. Min. Rep. 69).

[19] Londonderry M. Co. v. United Gold Mines Co., 38 Colo. 489, 88 Pac. 455, 457; Bismark Mt. G. M. Co. v. North Sunbeam G. M. Co., 14 Idaho, 516, 95 Pac. 14, 17; Smith v. Cascaden, 148 Fed. 792, 794, 78 C. C. A. 458.

[20] Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439, Fed. Cas. No. 9886, 19 Morr. Min. Rep. 616; Talmadge v. St. John, 129 Cal. 430, 62 Pac. 79, 80, 21 Morr. Min. Rep. 13.

§ 382. Variation between calls in certificate and monuments on the ground.—When it is once conceded that a recorded certificate of location is a statutory instrument affecting real property,[21] it follows that general rules regarding descriptive calls in this class of instruments apply generally to the construction of such certificates. But it has been held that where the position of the monuments as built upon a mining claim are described in such a way as to direction as to be confusing, the notice would nevertheless be sufficiently correct to be admitted in evidence.[22]

Mr. Washburn states the general rule to be, that courses and distances are generally regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to monuments and boundaries that are referred to as indicating and identifying the land.[23]

This doctrine has been uniformly applied by the courts to certificates of location of mining claims,[24] and

21 *Ante*, § 379.

22 Kinney v. Fleming, 6 Ariz. 263, 58 Pac. 722, 723, 20 Morr. Min. Rep. 13; Providence G. M. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641, 644, 19 Morr. Min. Rep. 625; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 871, 20 Morr. Min. Rep. 103.

23 Washburn on Real Property, 3d ed., p. 348; 2 Devlin on Deeds, § 1029; Garrard v. Silver Peak Mines, 82 Fed. 578, 585; Belden v. Hebard, 103 Fed. 532, 542, 43 C. C. A. 296.

24 Pollard v. Shively, 5 Colo. 309, 313; Book v. Justice M. Co., 58 Fed. 106, 115, 17 Morr. Min. Rep. 617; Hoffman v. Beecher, 12 Mont. 489, 31 Pac. 92, 17 Morr. Min. Rep. 503; Cullacott v. Cash G. S. M. Co., 8 Colo. 179, 6 Pac. 211, 214, 15 Morr. Min. Rep. 392; McEvoy v. Hyman, 25 Fed. 596, 599, 15 Morr. Min. Rep. 397; Smith v. Newell, 86 Fed. 56, 58; Meydenbauer v. Stevens, 78 Fed. 787, 792, 15 Morr. Min. Rep. 578; Treadwell v. Marrs, 9 Ariz. 333, 83 Pac. 350, 355; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 281; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 217, 60 C. C. A. 155, 22 Morr. Min. Rep. 688; Gibson v. Hjul, 32 Nev. 360, 108 Pac. 759, 762; Cardoner v. Stanley Cons. M. & M. Co., 193 Fed. 517; Duncan v. Eagle

is the rule prescribed by congressional law for construing mineral patents.[25] This rule, however, is not inflexible. It yields whenever, taking all the particulars of the instrument together, it would be absurd to apply it.[26]

The general rule applicable to patents, deeds, and other instruments of conveyance, that where a monument is referred to in a descriptive call, and it has been obliterated or destroyed, parol evidence may be introduced to show where it was actually located in the field,[27] does not, it seems, apply to certificates of location. As heretofore indicated, in order to invoke the rule that courses and distance yield to monuments, these monuments must be actually existing, and parol evidence is inadmissible to point out where they were originally placed.[28] The reason for this rule has been fully explained in a preceding section.[29]

§ 383. "Natural objects" and "permanent monuments."—The words "natural objects" and "permanent monuments" are general terms, susceptible of different shades of meaning, depending largely upon their application. What might be regarded as a per-

Rock G. M. & R. Co., 48 Colo. 569, 139 Am. St. Rep. 288, 111 Pac. 588, 593.

[25] Act of April 28, 1904; 33 Stats. at Large, 545; Comp. Stats. (Supp. 1911), p. 611, 10 Fed. Stats. Ann. 235; par. 147, Genl. Min. Regulations, as amended, 33 L. D. 183, 187—see appendix. The reasons impelling congress to pass this act are fully explained, *post*, § 671, the section dealing with the survey of lode claims.

[26] White v. Luning, 93 U. S. 514, 524, 23 L. ed. 938; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 281.

[27] *Ante*, § 375.

[28] Pollard v. Shively, 5 Colo. 309, 318; Thallmann v. Thomas, 102 Fed. 935; Christenson v. Simmons, 47 Or. 184, 82 Pac. 805, 807; Lillis v. Urrutia, 9 Cal. App. 557, 99 Pac. 992, 994; Duncan v. Eagle Rock G. M. & R. Co., 48 Colo. 569, 139 Am. St. Rep. 288, 111 Pac. 588, 592.

[29] *Ante*, § 375.

manent monument for one purpose might not be so considered with reference to a different purpose. The same rule applies to natural objects.[30] There is no particular necessity for drawing a distinction between "natural objects," such as streams, rivers, ponds, highways, trees, and other things, *ejusdem generis*, and "permanent monuments," which may imply an element of artificial construction, it being the manifest intent of the law that any object of a fairly permanent character, whether natural or artificial, may, if sufficiently prominent, serve for the purpose of reference and identification.

As to whether a given notice or certificate of location contains such a description of the claim as located by reference to some natural object or permanent monument as will identify it, is a question of fact to be determined by the jury,[31] and parol evidence is admissible for the purpose of proving that the thing named in the certificate is, in fact, a natural object or permanent monument.[32] In the absence of evidence for or

30 Quimby v. Boyd, 8 Colo. 194, 6 Pac. 462.

31 Eilers v. Boatman, 111 U. S. 356, 357, 4 Sup. Ct. Rep. 432, 28 L. ed. 454, 15 Morr. Min. Rep. 471; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 871, 20 Morr. Min. Rep. 103; Farmington G. M. Co. v. Rhymney G. M. Co., 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832, 833; Fissure M. Co. v. Old Susan M. Co., 22 Utah, 438, 63 Pac. 587, 588, 21 Morr. Min. Rep. 125; Gamer v. Glenn, 8 Mont. 371, 20 Pac. 654, 656; Brady v. Husby, 21 Nev. 453, 33 Pac. 801, 803; Flavin v. Mattingly, 8 Mont. 242, 19 Pac. 384, 385; Metcalf v. Prescott, 10 Mont. 283, 25 Pac. 1037, 1038, 1 Morr. Min. Rep. 137; Russell v. Chumasero, 4 Mont. 309, 1 Pac. 713, 714, 15 Morr. Min. Rep. 508; Bonanza Consol. M. Co. v. Golden Head M. Co., 29 Utah, 159, 80 Pac. 736, 738; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36, 39; Londonderry M. Co. v. United Gold Mines, 38 Colo. 480, 88 Pac. 455, 457; Ford v. Campbell, 29 Nev. 578, 92 Pac. 206, 210; Bismark Mt. G. M. Co. v. North Sunbeam G. Co., 14 Idaho, 516, 95 Pac. 14, 17; Vogel v. Warsing, 146 Fed. 949, 951, 77 C. C. A. 199; Humphreys v. Idaho Gold Mines Dev. Co. (Idaho), 120 Pac. 823, 826.

32 Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361, 363; O'Donnell v.

against the sufficiency of the reference in the notice, it will be presumed to be sufficient to identify the claim.[33]

The following cases indicate the views of the courts as to what are natural objects or permanent monuments:—

Prominent posts, or stakes, firmly planted in the ground;[34] stones, if the proper size and properly marked;[35] monuments,[36] prospect holes,[37] and shafts,[38]

Glenn, 8 Mont. 248, 19 Pac. 302, 304; Flavin v. Mattingly, 8 Mont. 242, 19 Pac. 384, 385; Metcalf v. Prescott, 10 Mont. 283, 25 Pac. 1037, 1038, 1 Morr. Min. Rep. 137; Dillon v. Bayliss, 11 Mont. 171, 27 Pac. 725, 726; Kelly v. Taylor, 23 Cal. 14; Londonderry M. Co. v. United Gold Mines Co., 38 Colo. 480, 88 Pac. 455, 457; Prince of Wales Lode, 2 Copp's L. O. 2, 3.

[33] Brady v. Husby, 21 Nev. 453, 33 Pac. 801, 802; Gleeson v. Martin White M. Co., 13 Nev. 442; Hammer v. Garfield M. & M. Co., 130 U. S. 291, 299, 9 Sup. Ct. Rep. 548, 32 L. ed. 964, 16 Morr. Min. Rep. 125; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 20 Morr. Min. Rep. 103; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572, 576, 22 Morr. Min. Rep. 276.

[34] Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 112, 11 Fed. 666, 677, 4 Morr. Min. Rep. 411; Russell v. Chumasero, 4 Mont. 309, 1 Pac. 713, 15 Morr. Min. Rep. 508; O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. 302; Hansen v. Fletcher, 10 Utah, 266, 37 Pac. 480, 482; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 871, 20 Morr. Min. Rep. 103; Credo M. & S. Co. v. Highland M. & M. Co., 95 Fed. 911, 914; Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244, 247, 20 Morr. Min. Rep. 522; Bonanza Consol. M. Co. v. Golden Head M. Co., 29 Utah, 159, 80 Pac. 736, 737; Bismark Mt. G. M. Co. v. North Sunbeam G. Co., 14 Idaho, 516, 95 Pac. 14, 17; McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136; Sturtevant v. Vogel, 167 Fed. 448, 453, 93 C. C. A. 84.

[35] Russell v. Chumasero, 4 Mont. 309, 1 Pac. 713, 714, 15 Morr. Min. Rep. 508; Gamer v. Glenn, 8 Mont. 371, 20 Pac. 654, 657.

[36] Hansen v. Fletcher, 10 Utah, 266, 37 Pac. 480, 482; Talmadge v. St. John, 129 Cal. 430, 62 Pac. 79, 80; Credo M. Co. v. Highland Co., 95 Fed. 911, 914.

[37] Hansen v. Fletcher, 10 Utah, 266, 37 Pac. 480, 482; Bismark Mt. G. M. Co. v. North Sunbeam G. Co., 14 Idaho, 516, 95 Pac. 14.

[38] Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 111, 11 Fed. 666, 679, 4 Morr. Min. Rep. 411; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 312, 1 Fed. 522, 9 Morr. Min. Rep. 529; Bismark Mt. G. M. Co. v. North Sunbeam G. Co., 14 Idaho, 516, 95 Pac. 14.

a depot and cliff of rocks,[39] may be sufficient as permanent monuments within the meaning of the law.[40] The boundary lines of well known claims have uniformly been held to be such,[41] whether patented or not.[42]

Where it is shown that under the system of locating placer claims in Alaska the one first discovered on a gulch is generally called "discovery claim" and other claims are numbered from such claim up or down the gulch or stream, and that it is customary to give to side or bench claims the same numbers as those upon the creek with the addition of a letter of the alphabet

[39] Farmington Co. v. Rhymney Co., 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832, 833.

[40] Meydenbauer v. Stevens, 78 Fed. 787, 791, 18 Morr. Min. Rep. 578.

[41] Upton v. Larkin, 7 Mont. 449, 17 Pac. 728, 730, 15 Morr. Min. Rep. 404; Russell v. Chumasero, 4 Mont. 309, 1 Pac. 713, 714, 15 Morr. Min. Rep. 508; Hammer v. Garfield M. & M. Co., 130 U. S. 291, 299, 9 Sup. Ct. Rep. 548, 32 L. ed. 964, 16 Morr. Min. Rep. 125; Metcalf v. Prescott, 10 Mont. 283, 25 Pac. 1037, 1038, 1 Morr. Min. Rep. 137; Book v. Justice M. Co., 58 Fed. 106, 112, 17 Morr. Min. Rep. 617; Southern Cross M. Co. v. Europa M. Co., 15 Nev. 383; Gamer v. Glenn, 8 Mont. 451, 20 Pac. 654, 658; Live Yankee Co. v. Oregon Co., 7 Cal. 41; Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244, 247, 20 Morr. Min. Rep. 522; Carlin v. Freeman, 19 Colo. App. 334, 75 Pac. 26, 27; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36, 39; Flynn Group M. Co. v. Murphy, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851, 854, 1 Water & Min. Cas. 619; Riste v. Morton, 20 Mont. 139, 49 Pac. 656, 657; Smith v. Newell, 86 Fed. 56, 57; Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300, 303; Kinney v. Fleming, 6 Ariz. 263, 56 Pac. 723, 724, 20 Morr. Min. Rep. 13; Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955, 958, 22 Morr. Min. Rep. 69; McCann v. McMillan, 129 Cal. 350, 62 Pac. 31, 33, 21 Morr. Min. Rep. 6. *Contra:* Baxter Mt. G. M. Co. v. Patterson, 3 N. M. 179, 3 Pac. 741, 743. See Gilpin etc. Co. v. Drake, 8 Colo. 586, 9 Pac. 787, 789 (overruled by Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244, 247, 20 Morr. Min. Rep. 522). And see Brown v. Levan, 4 Idaho, 794, 46 Pac. 661 (explained in Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955, 22 Morr. Min. Rep. 69).

[42] Londonderry M. Co. v. United Gold Mines Co., 38 Colo. 480, 88 Pac. 455.

as A, B, C, etc., to designate the tiers of claims back from the creek claims, a recorded notice of a claim in such locality designating it as "13A below discovery on Cleary creek" is sufficient, the claim being marked on the ground.[43]

It has been held that if a notice refers to a mining claim, there is a presumption that such claim exists [44] and that it is well known.[45] A tree is a fixed natural object, and when marked artificially or naturally there is less room to question its sufficiency than in the case of a shaft.[46] A canyon,[47] mountain or any other prominent feature of the landscape is a natural object.[48] The natural objects or permanent monuments referred to are not required to be on the ground located, although they may be.[49]

[43] Smith v. Cascaden, 148 Fed. 792, 797, 78 C. C. A. 458, Ross, J., dissenting.

[44] Kinney v. Fleming, 6 Ariz. 263, 56 Pac. 723, 724, 20 Morr. Min. Rep. 13; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36, 39; Londonderry M. Co. v. United Gold Mines Co., 38 Colo. 480, 88 Pac. 455, 457; McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136.

[45] Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 20 Morr. Min. Rep. 103; Credo M. Co. v. Highland M. & M. Co., 95 Fed. 911, 914; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 217, 60 C. C. A. 155, 22 Morr. Min. Rep. 688; Smith v. Cascaden, 148 Fed. 792, 793, 78 C. C. A. 458.

[46] Quimby v. Boyd, 8 Colo. 194, 6 Pac. 462, 467.

[47] Brady v. Husby, 21 Nev. 453, 33 Pac. 801, 803; Vogel v. Warsing, 146 Fed. 949, 952, 77 C. C. A. 199.

[48] Flavin v. Mattingly, 8 Mont. 242, 19 Pac. 384, 385; Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244, 247, 20 Morr. Min. Rep. 522; McKinley Creek M. Co. v. Alaska United M. Co., 183 U. S. 563, 569, 22 Sup. Ct. Rep. 84, 46 L. ed. 331, 21 Morr. Min. Rep. 730. "Said claim is situated two miles from said town of Armagosa" is wholly insufficient. Ford v. Campbell, 29 Nev. 578, 92 Pac. 206, 208.

[49] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 1 Fed. 522, 532, 9 Morr. Min. Rep. 529; Talmadge v. St. John, 129 Cal. 430, 62 Pac. 79, 80, 21 Morr. Min. Rep. 13; Credo M. Co. v. Highland M. & M. Co., 95 Fed. 911, 914; Bismark Mt. G. M. Co. v. North Sunbeam G. M. Co., 14 Idaho, 516, 95 Pac. 14, 17.

Where it is shown that a subsequent locator had actual notice of the location and the boundaries, neither he nor his grantee should be permitted to take advantage of some technical defect in the notice.[50]

§ 384. **Effect of failure to comply with the law as to contents of certificate.**—It follows from what we have heretofore said that any notice or certificate of location which is used as the basis of the record which fails to reasonably comply with the requirements of the federal law as to the contents of such record is ineffectual and void.[51]

As to the omission of any of the other elements required by state legislation, in some of the states the law itself prescribes the penalty by providing that the failure to insert any of the requirements renders the certificate of location void. This is the rule in Colorado,[52] Oregon (which provides that the *location* shall be void),[53] North Dakota,[54] South Dakota,[55] and Wyoming.[56] The laws of Nevada make the *record* of such certificate void,[57] destroying its value as evidence.[58]

[50] Bismark Mt. G. M. Co. v. North Sunbeam G. M. Co., 14 Idaho, 516, 95 Pac. 14, 17; Flynn Group M. Co. v. Murphy, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 851, 854, 1 Water & Min. Cas. 619.

[51] Deeney v. Mineral Creek M. Co., 11 N. M. 279, 67 Pac. 724, 22 Morr. Min. Rep. 47; Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153. See Brown v. Levan, 4 Idaho, 794, 46 Pac. 661, and Clearwater Ry. Co. v. San Garde, 7 Idaho, 106, 61 Pac. 137, as explained in Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955, 22 Morr. Min. Rep. 69.

[52] Rev. Stats. 1908, § 4195.

[53] Laws 1898, p. 18; Bellinger & Cotton's Code, § 3984; Lord's Or. Laws, § 5137.

[54] Rev. Code 1895, § 1429; Rev. Code 1899, § 1429; Rev. Code 1905, § 1803.

[55] Comp. Laws 1887, § 2000; Grantham's Annot. Stats. 1899, § 2659; Rev. Pol. Code 1903, § 2535.

[56] Comp. Stats. 1910, § 3468.

[57] Rev. Laws 1912, § 2424.

[58] Ford v. Campbell, 29 Nev. 578, 92 Pac. 206, 209; Zerres v. Vanina,

The laws of the other states and territories are silent upon the subject.

If the California-Arizona rule applicable to local regulations and customs[59] may be properly invoked in the case of statutory enactments,—that is, that a forfeiture is not worked unless the custom or local rule in terms so declares,[60]—the provisions of the statutes in the latter class of states, exacting requirements in excess of those made essential by the federal law, are merely directory, and their omission is accompanied with no serious consequences. We do not see why such rule should not be applicable alike to local and statutory regulations. As to the other states, where legislation of the character noted is found, it may be said that forfeitures are not favored by the courts, and where a location is made in good faith and all the essential requirements are complied with, instances are not frequent where the miner is deprived of substantial rights for failure to strictly comply with the letter of the law.

§ 385. Verification of certificates.—Three of the states,—Oregon,[61] Idaho[62] and Montana,[63]—require the

134 Fed. 610, 618; Gibson v. Hjul, 32 Nev. 360, 108 Pac. 759, 762; Wailes v. Davies, 164 Fed. 397, 398, 90 C. C. A. 385.

[59] *Ante*, § 274.

[60] This rule does not obtain in Montana, Nevada, nor Oregon. *Ante*, § 274; Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153, 154; Sissons v. Sommers, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829, 830; Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 222, 7 L. R. A., N. S., 791. In Yosemite M. Co. v. Emerson, 208 U. S. 25, 27, 28 Sup. Ct. Rep. 196, 52 L. ed. 374, the court points out the conflict of state decisions on this subject but declines to settle the question.

[61] Bellinger & Cotton's Code, § 3977; Lord's Or. Laws, § 5130.

[62] Civ. Code 1903, § 2564; Laws 1895, p. 29, § 13; Rev. Code 1907, § 3216.

[63] Rev. Pol. Code 1895, § 3612; Laws 1901, p. 140; Laws 1907, p. 18; Rev. Code 1907, § 2284.

certificate of a lode location to be verified by the oath of a locator or an affidavit to be attached thereto.

The validity of the legislation was at one time doubted.[64] But it is now well settled that it is a valid exercise of power conferred upon the states to supplement federal legislation.[65] The purpose of the law is to prevent fraud by subjecting the locator to the penalty of perjury if he swears falsely or corruptly.[66] The verification is not required to be made upon the actual personal knowledge of the locator;[67] it may be made by an agent[68] when the statute is silent. There is a special provision to this effect in the Montana law.

Article IX. The Record.

§ 389. Time and place of record.
§ 390. Effect of failure to record within the time limited.
§ 391. Proof of record.
§ 392. The record as evidence.

§ 389. Time and place of record.—As heretofore frequently indicated,[69] in the absence of a state law or local rule requiring it, there is no necessity for recording any notice or certificate in connection with the acquisition of title to public mineral lands by location.

[64] Wenner v. McNulty, 7 Mont. 30, 37, 14 Pac. 643–645; Metcalf v. Prescott, 10 Mont. 283, 293, 25 Pac. 1037, 1 Morr. Min. Rep. 137.

[65] McCowan v. Maclay, 16 Mont. 235, 40 Pac. 602; Berg v. Koegel, 16 Mont. 266, 40 Pac. 605; Mares v. Dillon, 30 Mont. 117, 75 Pac. 963, 964; Hickey v. Anaconda Copper Co., 33 Mont. 46, 81 Pac. 806, 810; Washoe Copper M. Co. v. Junila, 43 Mont. 178, 115 Pac. 917, 918, 1 Water & Min. Cas. 451; Van Buren v. McKinley, 8 Idaho, 93, 66 Pac. 936, 938, 21 Morr. Min. Rep. 690; Dunlap v. Patterson, 4 Idaho, 473, 95 Am. St. Rep. 140, 42 Pac. 504, 505.

[66] Mares v. Dillon, 30 Mont. 117, 75 Pac. 963, 965.

[67] Mares v. Dillon, 30 Mont. 117, 75 Pac. 963, 965.

[68] Dunlap v. Patterson, 4 Idaho, 473, 95 Am. St. Rep. 140, 42 Pac. 504, 505.

[69] *Ante*, §§ 273, 328.

But as observed in a preceding section,[70] the popular notion is, that notices of location should be recorded somewhere, and although in the absence of a law or rule so declaring, a failure to record may not be accompanied by any loss of right, yet the universal rule is to file the notice of location with the county officer charged by the state or territorial laws with the duty of registering instruments affecting title to real estate. In the absence of a statute a county recorder cannot be compelled to record. But if he chooses to do so, he does it not as county recorder elected by the people, but as a person selected by the miners to do an act not provided for by the recordation laws of the state.[71]

Where the law or regulation requires a record to be made, but does not specify the time within which it is to be effected, a reasonable time should be allowed, following the rule heretofore announced as to the time of performance of other acts of location.[72] What constitutes a reasonable time depends upon the circumstances surrounding each particular case, such as the distance from the discovered mine to the place of record, and the means of communication between the two points. For the most part, the states wherein laws exist requiring a record to be made provide for the time within which the notice or certificate is to be lodged with the recording officer.

In Alaska notices must be filed for record within ninety days from the date of discovery.[73] California allows thirty days from the date of posting;[74] Colorado,

[70] *Ante*, § 273.

[71] San Bernardino Co. v. Davidson, 112 Cal. 503, 44 Pac. 659. See Kern County v. Lee, 129 Cal. 361, 61 Pac. 1124, 1125.

[72] *Ante*, § 339.

[73] Sec. 15, Act of June 6, 1900, 31 Stats. at Large, 327; Sturtevant v. Vogel, 167 Fed. 448, 450, 93 C. C. A. 84.

[74] Civ. Code, § 1426b.

three months from date of discovery;[75] Idaho, ninety days after the location;[76] Montana, sixty days after posting;[77] Nevada, ninety days after posting;[78] New Mexico, within three months after posting;[79] North Dakota, sixty days from date of discovery;[80] Oregon, sixty days after posting;[81] South Dakota, sixty days from date of discovery;[82] Utah, thirty days from the date of posting;[83] Washington, ninety days from the date of discovery;[84] Wyoming, sixty days from date of discovery.[85]

Nevada provides for recording with the district recorder and the county recorder.[86]

In Utah, if there is a mining district recorder, the original and a duplicate must be filed with him, and it is made his duty to transmit the duplicate to the county recorder for record. If there is no mining district recorder, the record must be made directly with the county recorder.[87]

75 Mills' Annot. Stats., § 3150; Gen. Stats. 1883, p. 722; Rev. Stats. 1908, § 4194.

76 Civ. Code 1901, § 2559; Laws 1895, p. 27; Rev. Code 1907, § 3209.

77 Rev. Pol. Code 1895, § 3612; Laws 1901, p. 140; Laws 1907, p. 18; Rev. Code 1907, § 2284.

78 Comp. Laws 1900, § 210; Laws 1907, p. 420; Rev. Laws 1912, § 2424.

79 Comp. Laws 1884, p. 754, § 1566; Comp. Laws 1897, § 2286.

80 Rev. Code 1895, § 1428; Rev. Code 1899, § 1428; Rev. Code 1905, § 1802.

81 Laws 1901, p. 141; Bellinger & Cotton's Code, § 3977; Lord's Or. Laws, § 5130.

82 Comp. Laws 1887, § 1999; Amended Laws 1899, p. 146; Grantham's Ann. Stats. 1899, § 2658; Rev. Pol. Code 1903, § 2534; Laws 1903, p. 268.

83 Comp. Laws 1907, § 1498; Laws 1909, p. 79.

84 Ballinger's Supp. 1901–3, § 3151a; Rem. & Bal. Code 1909, § 7358.

85 Rev. Stats. 1899, § 2546; Comp. Stats. 1910, § 3467.

86 Comp. Laws 1900, § 210; Laws 1907, p. 420; Rev. Laws 1912, § 2424.

87 Laws 1899, p. 26, §§ 4, 9; Comp. Laws 1907, §§ 1498, 1502, 1503; Laws 1909, p. 79; Ford v. Campbell, 29 Nev. 578, 92 Pac. 206, 208.

Washington also has provisions for organization of mining districts and for recording with district recorders as well as the county auditor.[88]

In California, it was customary, before the passage of the act of March, 1897, to record in the county recorder's office, as well as with the district recorder, if there was one. In the absence of a written district rule, a custom as to place of record might be shown. But such custom, to be binding, ought to be so well known, understood, and recognized in the district, that locators should have no reasonable ground for doubt as to what was required as to place of record.[89]

In 1897 an act was passed, however, regulating the subject of recording and prohibiting district records. The act has been repealed,[90] but there is now in force a general law providing for the manner in which locations are to be made superseding all prior legislation.[91]

Arkansas[92] authorizes recording with the *ex-officio* recorder of the county, but does not make recording imperative or fix any limit of time in which the record shall be made.

§ 390. Effect of failure to record within the time limited.—The mere failure to record a notice, certificate, or declaratory statement within the statutory time does not render the location of the claim invalid, where there are no intervening rights before the record

[88] Rem. & Bal. Code 1909, §§ 7355, 7358.

[89] *Ante*, § 273.

[90] Stats. 1899, p. 148; County of Kern v. Lee, 129 Cal. 361, 61 Pac. 1124, 1125; Stats. 1900, p. 9. As to the effect of this repeal upon locations made while the act was in force, the validity of which came into question subsequent to the repeal, see Dwinell v. Dwyer, 145 Cal. 12, 78 Pac. 247, 248, 7 L. R. A., N. S., 763; Big Three M. & M. Co. v. Hamilton, 157 Cal. 130, 137 Am. St. Rep 118, 107 Pac. 301, 307.

[91] Civ. Code, § 1426 et seq.

[92] Act of 1899, p. 113, §§ 1, 2, 3.

is properly made, if there has been full compliance with the law in all other respects.[93]

This rule obtains in the absence of a statute which affixes a penalty for failure to record.[94]

It is but the reiteration of a principle announced in a previous section,[95] that the failure to comply with any of the requirements of the law within the time limited *may* subject the ground to relocation;[96] that the locator delays the performance of these acts at his peril; but if he complies with the law prior to the acquisition of any right by a subsequent locator, no one has a right to complain. The claim may not be relocated until after the time to record has expired;[97] and

93 Preston v. Hunter, 67 Fed. 996, 999, 15 C. C. A. 148; Faxon v. Barnard, 4 Fed. 702, 703, 2 McCrary, 44, 9 Morr. Min. Rep. 515; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111, 113, 17 Morr. Min. Rep. 28; Craig v. Thompson, 10 Colo. 517, 16 Pac. 24, 27. See, also, Lockhart v. Leeds, 10 N. M. 568, 63 Pac. 48, 51; Columbia Copper M. Co. v. Duchess M. & M. Co., 13 Wyo. 244, 79 Pac. 385, 386; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36, 38; Zerres v. Vanina, 134 Fed. 610, 618; S. C., in error, 150 Fed. 564, 80 C. C. A. 366; Washington G. M. Co. v. O'Laughlin, 46 Colo. 503, 105 Pac. 1092, 1093; Bergquist v. West Virginia & Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673, 677.

94 Last Chance M. Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 579, 586, 66 C. C. A. 299; *certiorari* denied, 200 U. S. 617, 26 Sup. Ct. Rep. 754, 50 L. ed. 622; Sturtevant v. Vogel, 167 Fed. 448, 93 C. C. A. 84.

95 *Ante*, § 330.

96 Lockhart v. Wills, 9 N. M. 344, 54 Pac. 336, 19 Morr. Min. Rep. 497.

97 Lockhart v. Leeds, 10 N. M. 568, 63 Pac. 48, 51; S. C., *sub nom.* Lockhart v. Johnson, 181 U. S. 518, 21 Sup. Ct. Rep. 665, 45 L. ed. 979; Lockhart v. Leeds, 195 U. S. 427, 25 Sup. Ct. Rep. 76, 49 L. ed. 263. See, also, Belk v. Meagher, 104 U. S. 279, 282, 26 L. ed. 735; Dwinnell v. Dyer, 145 Cal. 17, 78 Pac. 247, 250, 7 L. R. A., N. S., 763; Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931, 933; Nash v. McNamara, 30 Nev. 114, 133 Am. St. Rep. 694, 93 Pac. 405, 406, 16 L. R. A., N. S., 168; Farrell v. Lockhart, 210 U. S. 142, 147, 28 Sup. Ct. Rep. 681, 52 L. ed. 994, 16 L. R. A., N. S., 162; Last Chance M. Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 529, 585, 586, 66 C. C. A. 299.

if the first locator does all the other acts with intent to locate, but fails to record within the time limited, he gets a good title, notwithstanding a subsequent locator performs all the acts of location, including recording, prior to the time in which the first locator should have recorded.[98]

In the state of Nevada a much broader rule obtains. It is there held that the provision in the statute as to time within which a notice is to be recorded is merely directory, and that a failure to record does not render the ground subject to location but merely shifts the burden of proof.[98a] A record made after the lapse of the time fixed and after relocation has been upheld and the relocation determined to be void.[99]

This rule is in force in Alaska.[100]

The acts when completed will relate back to the inception of the right. If the certificate is deposited with the recorder to be recorded, that is sufficient. His failure to record will not injure the locator.[1]

Where the requirement as to recording is fixed by local rule, the failure to record, in our opinion, will not work forfeiture unless the rule itself so provides.

This is the view adopted by the supreme courts of California and Arizona, and, as heretofore observed, is

98 Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 20 Morr. Min. Rep. 103; Last Chance M. Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 579, 585, 586, 66 C. C. A. 299; Big Three M. & M. Co. v. Hamilton, 157 Cal. 130, 137 Am. St. Rep. 118, 107 Pac. 301, 304. See, also, Shepard v. Murphy, 26 Colo. 350, 58 Pac. 588.

98a Indiana-Nevada M. Co. v. Gold Hills M. & M. Co. (Nev., Oct. 7, 1912), 126 Pac. 965, 967.

99 Zerres v. Vanina, 134 Fed. 610, 617; Wailes v. Davies, 158 Fed. 667; S. C., on appeal, 164 Fed. 397, 90 C. C. A. 385; Ford v. Campbell, 29 Nev. 578, 92 Pac. 206, 209.

100 Sturtevant v. Vogel, 167 Fed. 448, 451, 452, 93 C. C. A. 84.

1 Shepard v. Murphy, 26 Colo. 350, 58 Pac. 588.

the rule followed by the federal courts with regard to Alaska.[2]

§ 391. **Proof of record.**—Where a state law or local rule requires the certificate to be recorded with a county officer whose duties are defined by statute, such as recorder, clerk, or register of deeds, the record will prove itself, and, as a rule, certified copies thereof are admissible in evidence with like effect as the original. But in case of records in the mining district, the rule is different. Such records do not prove themselves. They must be produced by the proper officer, whose official character must be shown, and the authenticity of such records must be established.[3] Certified copies of such records cannot be admitted in evidence, unless it be first shown that their custodian was empowered under the local rules to give and authenticate such copies.[4]

§ 392. **The record as evidence.**—Constructive notice by recording is wholly a creature of the statute. A record not provided for by statute or recognized by law gives no notice. Therefore, before a record of a mining location can be introduced in evidence for any purpose, it must appear that it is authorized by law; otherwise, it is irrelevant and inadmissible.[5]

It is possible that the posted and recorded notices for which there is no express legal sanction may possess

[2] Sturtevant v. Vogel, 167 Fed. 448, 453, 93 C. C. A. 84.

[3] Roberts v. Wilson, 1 Utah, 292.

[4] Harvey v. Ryan, 42 Cal. 626; Roberts v. Wilson, 1 Utah, 292; *ante*, § 272. See, also, Attwood v. Fricot, 17 Cal. 37, 76 Am. Dec. 567.

[5] Moxon v. Wilkinson, 2 Mont. 421; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312; Chamberlain v. Bell, 7 Cal. 292, 68 Am. Dec. 260; Mesick v Sunderland, 6 Cal. 298, 315; Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 969; Mutchmor v. McCarty, 149 Cal. 603, 87 Pac. 85, 86; 1 Wharton on Evidence, 3d ed., § 643.

evidentiary quality and be permissible of introduction. They may be given no definite legal effect, and are of no value except as acts *in pais* to be considered in connection with well-known customs and practices of mining prospectors as an item of evidence upon the question of compliance with the imperative behests of the mining law with respect especially to the marking of the surface location so that its boundaries can be readily traced.[6]

Where such record is authorized, it is *prima facie* evidence only of such facts as are required by law to be stated therein,[7] provided they are sufficiently stated.[8] A record of a certificate of a location which recites the citizenship of locators,[8a] the fact of discovery, and the fact that the location had been marked upon the ground so that the boundaries could be readily traced,[9] is not evidence of any of these facts[10] in any of the states, for

6 Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 969; Walton v. Wild Goose, M. & T. Co., 123 Fed. 209, 214, 60 C. C. A. 155, 22 Morr. Min. Rep. 688.

7 2 Jones on Evidence, § 521; Fox v. Myers, 29 Nev. 169, 86 Pac. 793, 797; Bismark Mt. G. M. Co. v. North Sunbeam G. Co., 14 Idaho, 516, 95 Pac. 14, 16.

8 Strepey v. Stark, 7 Colo. 614, 5 Pac. 111, 17 Morr. Min. Rep. 28; Jantzen v. Arizona C. Co., 3 Ariz. 6, 20 Pac. 93, 94; Bismark Mt. G. M. Co. v. North Sunbeam G. Co., 14 Idaho, 516, 95 Pac. 14, 16.

8a In Dean v. Omaha-Wyoming Oil Co. (Wyo., Jan. 7, 1913), 128 Pac. 881, 885, the court said that the recital in the certificate to the effect that the locators were citizens, coupled with other facts, might raise a presumption of such citizenship.

9 An exception to this is found in the Montana statute, which gives the locator the option of describing his markings in his recorded notice and making the certificate *prima facie* evidence of all facts properly recited in the notice. Rev. Code 1907, § 2284.

10 Flick v. Gold Hill & L. M. Co., 8 Mont. 298, 20 Pac. 807, 808; Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 969; Mutchmor v. McCarty, 149 Cal. 603, 87 Pac. 85, 86. In McCleary v. Broaddus, 14 Cal. App. 60, 111 Pac. 125, 127, the California district court of appeals said *arguendo:* "Ordinarily . . . . the notice is *evidence* of an original discovery." We think this *dictum* against the weight of authority.

the simple reason that no such facts are required to be stated in any of the statutory notices.[11]

Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate.[12] The record of the certificate is proof itself of its own performance as one of such steps, and in regular order, generally speaking, the last step in perfecting the location.[13]

While many of the states require the date of the discovery to be stated in the recorded certificate, this would not be evidence of the *fact* of discovery.[14] A discovery once proved, such a record would, *prima facie*, fix the date. Discovery is the most important of all the acts required in the proceedings culminating in a perfected location. But it is not a matter of record, but *in pais*, and if controverted must be proved independently of the recital in the certificate.[15] It is the foundation of the right without which all other acts are idle and superfluous. With the exception of three states (Idaho, Montana and Oregon), the certificate

11 Magruder v. Oregon and California R. R. Co., 28 L. D. 174.

12 Zerres v. Vanina, 134 Fed. 610, 619.

13 Strepey v. Stark, 7 Colo. 614, 619, 5 Pac. 111, 113, 17 Morr. Min. Rep. 28; Magruder v. Oregon & California R. R. Co., 28 L. D. 174; Farmington G. M. Co. v. Rhymney G. & C. Co., 20 Utah, 363, 77 Am. St. Rep. 913, 58 Pac. 832, 833.

14 Smith v. Newell, 86 Fed. 56; Fox v. Myers, 29 Nev. 169, 86 Pac. 793; Magruder v. Oregon & California R. R. Co., 28 L. D. 174; McQuiddy v. State of California, 29 L. D. 181; Elda M. Co., 29 L. D. 279; Harkrader v. Goldstein, 31 L. D. 87; Round Mountain M. Co. v. Round Mountain Sphinx M. Co. (Nev., Jan. 4, 1913), 129 Pac. 308, 311.

15 Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 352, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

is executed with no solemnity. It is neither acknowledged nor sworn to. It is a mere *ex parte*, self-serving declaration on his own behalf of the party most interested.[16] The same may be said of marking the boundaries.[17]

It is quite true that when a certificate contains a description of the claim with reference to a natural object or permanent monument, the recorded notice to this extent may be *prima facie* evidence of its own sufficiency, for the reason that the statute requires such description to be inserted in the certificate.[18]

The real purpose of the record is to operate as constructive notice of the fact of an asserted *claim* and its extent.[19] When the locator's right is challenged, he should be compelled to establish by proof outside of the certificate all the essential facts, without the existence of which the certificate possesses no potential validity.[20] These facts once proved, the recorded certificate may be considered as *prima facie* evidence of such other facts

[16] Judge Phillips, in his charge to the jury in Cheesman v. Shreeve, 40 Fed. 787, 791, 17 Morr. Min. Rep. 260, said that certificates of location are presumptive evidence of discovery. But in this case, many years elapsed between the original location and the litigation, and the fact of discovery was supported by the testimony of the parties. Under these circumstances the judge held that every reasonable presumption should be indulged in favor of the integrity of the location. The reasoning, while persuasive so far as this case is concerned, does not militate against the views announced in the text.

[17] Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 352, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

[18] See Kinney v. Fleming, 6 Ariz. 263, 56 Pac. 723, 20 Morr. Min. Rep. 13; Providence G. M. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641, 19 Morr. Min. Rep. 625.

[19] Meydenbauer v. Stevens, 78 Fed. 787, 792, 18 Morr. Min. Rep. 578.

[20] Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 969; Mutchmor v. McCarty, 149 Cal. 603, 87 Pac. 85, 86; Uinta T. M. Co. v. Ajax G. M. Co., 141 Fed. 563, 565; Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 354, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

as are required to be stated therein,[21] which is, of course, subject to contradiction.[22]

Article X. Change of Boundaries and Amended or Additional Location Certificates.

§ 396. Circumstances justifying change of boundaries.
§ 397. Privilege of changing boundaries exists in the absence of intervening rights, independent of state legislation.
§ 398. Objects and functions of amended certificates.

§ 396. Circumstances justifying change of boundaries.—The difficulties surrounding the locator in determining the precise position of his discovered vein in the earth, the probable course of its apex, and in many instances its width, frequently render it impossible for him to so mark his boundaries within the time allowed by law for that purpose as to entitle him to the full measure of property rights which the law permits him to acquire as the reward for his discovery. It frequently happens that the limited extent of surface exploration possible within the periods allowed him does not develop the true conditions. His markings, therefore, are frequently based on erroneous suppositions and wrong theories.[23] While as against subsequent locators he may be permitted to hold possession of his location made on such erroneous suppositions,[24] his rights may be curtailed unless rectification is made prior to intervening claims. While the government is

21 Porter v. Tonopah North Star T. & D. Co., 133 Fed. 756, 763; affirmed on appeal, 146 Fed. 385, 76 C. C. A. 657.

22 Zerres v. Vanina, 134 Fed. 610, 619.

23 See Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 971. For illustration of cases where the locator mistook the course of his vein and located across instead of along it, see *post*, §§ 586, 587, 588.

24 Harper v. Hill, 159 Cal. 250, 113 Pac. 162, 165, 1 Water & Min. Cas. 585.

not concerned with the particular individual who is the recipient of its bounty, and it makes but little difference to it who discovers and develops its mineral resources, its policy is to encourage the search for, and the opening of, mines, and this policy is best subserved by permitting the discoverer to rectify and readjust his lines whenever he may do so without impairing the intervening rights of others.[25]

While the locator marks his boundaries in every instance at his peril, there is no reason why he should be compelled to abide by first impressions, if no one is injured by a subsequent rectification of such boundaries.

It also frequently happens that at the time a discovery is made, the existence of contiguous prior locations prevents him from giving to his surface that symmetrical form which the law contemplates; or if he makes it in the ideal form, a surface conflict arises, rendering the extent of his rights vague and uncertain. These prior locations are frequently abandoned, and the ground embraced therein becomes subject to reappropriation. As heretofore suggested, when such abandonment or forfeiture becomes effectual, the conflict area does not inure to the advantage of the junior locator.[26] But the courts uphold the right of the junior under such circumstances to re-form his lines and amend his location so as to include the abandoned overlapping surface.[27]

There is no statute, law, rule, or regulation which prevents a locator of a mining claim from amending his location, and including additional vacant ground

[25] Swanson v. Kettler, 17 Idaho, 321, 105 Pac. 1059, 1064.

[26] *Ante*, § 363; *post*, § 645a.

[27] Id.

unclaimed by other parties, or even giving to the new location a different name.[28]

Where an application for patent is made, and a survey for that purpose is ordered, the deputy mineral surveyor is controlled by the record of the certificate of location, where one is required,[29] and the markings on the ground, the latter controlling where there is a variation between the descriptive calls of the record and the monuments.[30] While, for the purpose of obtaining parallelism,[31] or casting off excess,[32] the lines may be drawn in, so that, as finally surveyed, the boundaries are approximately within the limits of the surface area as originally claimed, yet no authority is given to extend the surveyed boundaries so as to include area which at the time of the survey is not within the ground actually claimed, or found to be, at least, approximately within the lines connecting the monuments as marked, prior to the order for survey.

It is therefore frequently found necessary to change boundaries before applying for an order for survey; and when so changed, an amended location is made, and an amended certificate is prepared and recorded, which, if free from conflicts with those whose rights have supervened since the perfection of the original location, is just as valid as if made in the original instance.[33]

[28] Shoshone M. Co. v. Rutter, 87 Fed. 801, 806, 31 C. C. A. 223, 19 Morr. Min. Rep. 356.

[29] Lincoln Placer, 7 L. D. 81; Rose Lode Claims, 22 L. D. 83; Commissioner's Letter, 1 Copp's L. O. 12.

[30] *Ante*, § 382.

[31] Doe v. Sanger, 83 Cal. 203, 214, 23 Pac. 365, 367, 17 Morr. Min. Rep. 298; Doe v. Waterloo M. Co., 54 Fed. 935, 940; Tyler v. Sweeney, 54 Fed. 284, 4 C. C. A. 329; Last Chance M. Co. v. Tyler, 61 Fed. 557, 9 C. C. A. 613; Philadelphia M. Claim v. Pride of the West, 3 Copp's L. O. 82.

[32] Credo M. & M. Co. v. Highland M. & M. Co., 95 Fed. 911, 916.

[33] Tipton G. M. Co., 29 L. D. 718.

Those locating subsequently to the perfection of the amended location are not injured, and have no right to complain.[34]

§ 397. Privilege of changing boundaries exists, in the absence of intervening rights, independent of state legislation.—In most of the states, amended locations and certificates are the subject of statutory regulation. This is the case in Colorado,[35] California,[36] Idaho,[37] Arizona,[38] Montana,[39] Nevada,[40] New Mexico,[41] North Dakota,[42] Oregon,[43] South Dakota,[44] Washington,[45] and Wyoming.[46]

The provisions in all these states, with the exception of those in Arizona, are on parallel lines with those of Colorado, which are as follows:—

> If, at any time, the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was erroneous, defective, or that the requirements of the law

[34] Gleeson v. Martin White M. Co., 13 Nev. 442; Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 134 Fed. 268, 270; Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 591, 604, 66 C. C. A. 99; appeal dismissed, 200 U. S. 613, 26 Sup. Ct. Rep. 754, 50 L. ed. 620; *certiorari* denied, 200 U. S. 617, 26 Sup. Ct. Rep. 754, 50 L. ed. 622.

[35] Mills' Annot. Stats., § 3160; Rev. Stats. 1908, § 4210.

[36] Civ. Code, § 1426h.

[37] Laws 1895, p. 27, § 5; Civ. Code 1901, § 2566; Rev. Code 1907, § 3210.

[38] Rev. Stats. 1901, § 3238.

[39] Laws 1901, p. 56, §§ 1, 2; Rev. Code 1907, §§ 2288, 2289.

[40] Comp. Laws 1900, § 213; Rev. Laws, 1912, § 2427.

[41] Comp. Laws 1897, § 2301.

[42] Rev. Code 1895, § 1437; Id. 1899, § 1437; Id. 1905, § 1811.

[43] Laws 1905, p. 254; Lord's Or. Laws, § 5140.

[44] Comp. Laws Dak. 1887, § 2008. Adopted by South Dakota—Laws 1890, ch. cv; Grantham's Annot. Stats. S. D. 1899, § 2667; Rev. Pol. Code 1903, § 2543.

[45] Laws 1899, p. 70, § 5; Rem. & Bal. Codes 1909, § 7362.

[46] Rev. Stats. 1899, § 2538; Comp. Stats. 1910, § 3459.

had not been complied with before filing, or shall be desirous of changing his surface boundaries, or taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator, or his assigns, may file an additional certificate, subject to the provisions of this act; *provided*, that such relocation does not interfere with existing rights of others at the time of such relocation, and no such relocation, or other record thereof, shall preclude the claimant, or claimants, from proving any such title, or titles, as he, or they, may have held under previous location.

In Arizona the section on this subject is as follows:—

Location notices may be amended at any time and the monuments changed to correspond to the amended location; *provided*, that no change shall be made that will interfere with the rights of others.

But, in the nature of things, this right exists throughout the mining regions, independently of statutory regulations. The supreme court of California held, at a time when there was no statute in that state on the subject, that if locators have any apprehension as to the sufficiency of their original location, there is no reason why they should not be permitted to modify or amend it.[47]

Of course, the alteration of boundaries, by taking in new territory and filing amended certificates *where the antecedent one is absolutely void*, cannot be permitted to the prejudice of intervening rights.[48] But with this

[47] Thompson v. Spray, 72 Cal. 528, 529, 14 Pac. 182, 183; Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 975.

[48] Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240; Fisher v. Seymour, 23 Colo. 542, 49 Pac. 30; Omar v. Soper, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443, 447, 15 Morr. Min. Rep. 496; Hall v. Arnott, 80 Cal. 348, 22 Pac. 200, 203; Tombstone Townsite Cases, 2 Ariz. 272, 15 Pac.

qualification, the right to change boundaries and rectify lines exists throughout the mining regions.[49]

In dealing with this subject in the future, we shall assume the correctness of this theory, and, therefore, that the decisions of the courts in states where laws of this character exist, so far as underlying principles are discussed therein, may be resorted to as precedents in states where legislation on the subject is wanting. We think the circumstances set forth in the preceding section justify this assumption.

§ 398. Objects and functions of amended certificates. Where a change of boundaries is sought, the acts necessary to accomplish the desired result are specified by statute in the states enumerated in the preceding section. Where there is no statute, in re-marking the boundaries and preparing and recording the certificate the same formalities should be observed as in the case of an original location.

In speaking of the objects and functions of additional or amended certificates of location, the supreme court of Colorado thus states its views:—

> The evident intent of the statute is, that the additional certificate shall operate to cure defects in the

26, 27; Wight v. Tabor, 2 L. D. 738; Washington Gold M. Co. v. O'Laughlin, 46 Colo. 503, 105 Pac. 1092. The same rule obtains when the location as originally made is void for lack of proper discovery. Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054, 1056.

[49] Frisholm v. Fitzgerald, 25 Colo. 290, 53 Pac. 1109; Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244, 20 Morr. Min. Rep. 522; Morrison v. Regan, 8 Idaho, 291, 67 Pac. 956, 22 Morr. Min. Rep. 69; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 19 Morr. Min. Rep. 650; Tonopah & Salt Lake M. Co. v. Tonopah M. Co., 125 Fed. 389, 395; Empire State-Idaho, M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 591, 604, 66 C. C. A. 99; Porter v. Tonopah North Star T. & D. Co., 133 Fed. 756, 763; Swanson v. Kettler, 17 Idaho, 321, 105 Pac. 1059, 1064; King Solomon Tunnel etc. Co. v. Mary Verna M. Co., 22 Colo. App. 528, 127 Pac. 129, 132.

original, and thereby to put the locator, where no other rights have intervened, in the same position that he would have occupied if no such defect had occurred. Such intent is in accord with the principle of all curative provisions of law.[50]

And in a later case the same court says:—

It is to the end that the prospector may cure any defects in his location and conserve and protect the results of his industry that the authority is given.[51]

Such a certificate may be used as evidence, although the original may be incomplete or imperfect, upon the theory that the amended certificate relates back to a *right* of location accruing by virtue of the prerequisite discovery and an attempted compliance with the law.[52] When the original certificate of location may be deemed defective, an additional one may be filed to correct its defects, and both may be put in evidence.[53]

50 Strepey v. Stark, 7 Colo. 614, 620, 5 Pac. 111, 115, 17 Morr. Min. Rep. 28; Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054; Butte Consol. M. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 304, 90 Pac. 177, distinguishing Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015, 1016; Milwaukee Gold Extraction Co. v. Gordon, 37 Mont. 209, 95 Pac. 995, 997; Tonopah & Salt Lake M. Co. v. Tonopah M. Co., 125 Fed. 389, 396; Bergquist v. West Virginia & Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673, 678.

51 Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244, 246, 20 Morr. Min. Rep. 522.

52 McGinnis v. Egbert, 8 Colo. 41, 45, 5 Pac. 652, 654, 15 Morr. Min. Rep. 329; Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69; Becker v. Pugh, 9 Colo. 589, 13 Pac. 906, 907, 15 Morr. Min. Rep. 304; Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244, 20 Morr. Min. Rep. 522; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111, 113, 17 Morr. Min. Rep. 28; Butte Consol. M. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 303, 90 Pac. 177; Giberson v. Tuolumne Copper Co., 41 Mont. 396, 109 Pac. 974, 975; dissenting opinion, Frisholm v. Fitzgerald, 25 Colo. 290, 53 Pac. 1109.

53 Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244, 20 Morr. Min. Rep. 522; Bismark Mt. G. M. Co. v. North Sunbeam G. Co., 14 Idaho, 516, 95 Pac. 14, 16; Milwaukee Gold Extraction Co. v. Gordon, 37

A distinction is drawn between cases where the original certificate is absolutely void,[54] or where the amended certificate seeks to appropriate new and additional ground, and one where the original is simply defective. If in making the amended location it included land not in the original location, and interfered with existing rights as to such land, the amended location would not relate back to the date of the original location, so far as the recently included land is concerned.[55]

The supreme court of Arizona expresses the opinion that the word "void" used in the statute should be construed to mean "voidable." In other words, a notice failing to conform to the statute and thus declared by the law to be void may, in the absence of intervening rights, be made valid by an amended location notice; e. g., a relocation of a claim alleged to have been abandoned was made and the notice failed to specify that it was a relocation of abandoned ground. While the court held the notice void,[56] it also held it could be validated by an amended notice in the absence of intervening rights.[57]

Where the object is simply to cure imperfections and obvious defects, and there is no attempt to include new

Mont. 209, 95 Pac. 995, 1000; Tonopah & Salt Lake M. Co. v. Tonopah M. Co., 125 Fed. 389, 400; Giberson v. Tuolumne Copper Co., 41 Mont. 396, 109 Pac. 974, 975.

[54] Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054.

[55] Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955, 961, 22 Morr. Min. Rep. 69; Bismark Mt. G. M. Co. v. North Sunbeam G. M. Co., 14 Idaho, 516, 95 Pac. 14, 16.

[56] Cunningham v. Pirring, 9 Ariz. 288, 80 Pac. 329, 330; Kinney v. Lundy, 11 Ariz. 75, 89 Pac. 496, 497. See, also, Bergquist v. West Virginia & Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673, 677.

[57] Kinney v. Lundy, 11 Ariz. 75, 89 Pac. 496, 497.

ground, the amended certificate will relate back to the original in spite of intervening locations.[58]

> Everyone who is at all familiar with mining locations knows that in practice the first record must usually, if not always, be imperfect. Recognizing these difficulties, it has never been the policy of the law to avoid a location for defects in the record, but rather to give the locator an opportunity to correct his record, whenever defects may be found in it. . . . . This is the function and proper office of amendments: To put the original in as perfect condition as if it had been complete in the first instance.[59]

In other words, a reasonable latitude of amendment is allowed, of which the locator cannot be deprived because someone has attempted to relocate his ground.

There is a distinction between amending an original location by re-forming lines and rectifying errors based upon a prior discovery and location, and the relocation of abandoned ground. The former, if properly made, and no other rights have intervened, takes effect, subject to the qualification heretofore stated, by relation, as of the date of the original; whereas, relocation of abandoned ground becomes operative only

[58] McEvoy v. Hyman, 25 Fed. 596, 599, 15 Morr. Min. Rep. 397; Tombstone Townsite Cases, 2 Ariz. 272, 15 Pac. 26, 27; Hall v. Arnott, 80 Cal. 348, 22 Pac. 200, 203; Frisholm v. Fitzgerald, 25 Colo. 290, 53 Pac. 1109 (dissenting opinion); Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244, 246, 20 Morr. Min. Rep. 522; Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955; Bismark Mt. G. M. Co. v. North Sunbeam G. M. Co., 14 Idaho, 516, 95 Pac. 14, 16; Bergquist v. West Virginia & Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673, 677.

[59] McEvoy v. Hyman, 25 Fed. 596, 600, 15 Morr. Min. Rep. 397; Bismark Mt. G. M. Co. v. North Sunbeam G. M. Co., 14 Idaho, 516, 95 Pac. 14, 16; Tonopah & Salt Lake M. Co. v. Tonopah M. Co., 125 Fed. 389, 396. See, also, Craig v. Thompson, 10 Colo. 517, 16 Pac. 24.

from the date of its perfection;[60] and whether a given certificate is a mere amendment or a relocation of abandoned ground will depend upon the facts as they exist, and not upon the recitals of the certificate.[61] The second or amended notice is not an abandonment of the original.[62] An amended notice cannot, by the mere omission to insert names of the original locators, divest the title acquired by the original location,[63] unless done with their knowledge and consent.[64]

Additional territory embraced within an amended location made by one cotenant will inure to the benefit of all, on the principle that the right to change the boundaries arises out of, and relates back to, the original location.[65]

60 Cheesman v. Shreeve, 40 Fed. 787, 789, 17 Morr. Min. Rep. 260; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36, 38; Bergquist v. West Virginia & Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673, 678.

61 Id.

62 Thompson v. Spray, 72 Cal. 528, 14 Pac. 182; Weill v. Lucerne M. Co., 11 Nev. 200, 213; Temescal Oil M. & D. Co. v. Salcido, 137 Cal. 211, 69 Pac. 1010; Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 591, 604; Bergquist v. West Virginia & Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673, 678; King Solomon etc. Co. v. Mary Verna M. Co., 22 Colo. App. 528, 127 Pac. 129, 132.

63 Thompson v. Spray, 72 Cal. 528, 14 Pac. 182, 183; Hallack v. Traber, 23 Colo. 14, 46 Pac. 110, 18 Morr. Min. Rep. 360; Stevens v. Grand Central M. Co., 133 Fed. 28, 30, 67 C. C. A. 284; Lockhart v. Leeds, 195 U. S. 427, 433, 25 Sup. Ct. Rep. 76, 49 L. ed. 263, where there was a fraudulent relocation under another name; Mono M. Co. v. Magnolia E. & W. Co., 2 Copp's L. O. 68; In re Teller, 26 L. D. 484, 486; In re Auerbach, 29 L. D. 208.

64 Morton v. Solambo C. M. Co., 26 Cal. 527; Gore v. McBrayer, 18 Cal. 583; Moore v. Hamerstag, 109 Cal. 122, 125, 41 Pac. 805, 806, 18 Morr. Min. Rep. 256.

65 Hallack v. Traber, 23 Colo. 14, 46 Pac. 110, 18 Morr. Min. Rep. 360. See Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943, 945, 19 Morr. Min. Rep. 556; Van Wagenen v. Carpenter, 27 Colo. 444, 61 Pac. 698.

Where an amendment is made to a location which embraces new ground, it is not necessary to make a new discovery in the added area.[66]

Where the second, or amended, notice contains names other than those set forth in the original, in an action against strangers this fact cannot be taken advantage of. It may be treated as an original notice as to the persons whose names do not appear on the first, and as a supplemental or amended notice as to those whose names appear on both.[67]

Any radical change of the name of a claim might be construed as an attempt to hide its identity, and mislead adverse claimants in patent proceedings, or to accomplish a fraudulent purpose such as the exclusion of a co-owner;[68] but the mere dropping of a descriptive prefix—as, for instance, naming a claim the "Tiger" instead of the "Little Tiger," "Shields" in place of "General Shields," or "Flag" instead of "American Flag," or the addition of a suffix as "Annex-Plumber," the name in the original being "Annex"[69]—where the other descriptive portions of the notice are regular, is of no importance.[70]

It is not necessary that the purposes for which a certificate is amended should be specified. The filing of

[66] Tonopah & Salt Lake M. Co. v. Tonopah M. Co., 125 Fed. 389, 399. A different rule would obtain in the case of a placer claim where the original location exhausted the statutory limit. Weed v. Snook, 144 Cal. 439, 77 Pac. 1023, 1025; Garden Gulch Placer, 38 L. D. 28; In re Head, 40 L. D. 135. See, also, Bigelow v. Conradt, 159 Fed. 868, 87 C. C. A. 48.

[67] Thompson v. Spray, 72 Cal. 528, 529, 14 Pac. 182, 183; Tonopah & Salt Lake M. Co. v. Tonopah M. Co., 125 Fed. 389, 396.

[68] Lockhart v. Leeds, 195 U. S. 427, 434, 25 Sup. Ct. Rep. 76, 49 L. ed. 263.

[69] Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 303, 90 Pac. 177.

[70] Seymour v. Fisher, 16 Colo. 188, 199, 27 Pac. 240. See Fisher v. Seymour, 23 Colo. 542, 49 Pac. 30.

such certificate, if made under proper conditions, is effectual for all the purposes enumerated in the statute, whether such purposes are mentioned in the certificate or not.[71]

Where an amended location is made to cure defects in original, covering the identical ground, the locator may adopt stakes and monuments of the original location, and his intention to do so may be inferred from the circumstances.[72]

There are certain factors involved in amending placer locations which modify some of the rules discussed in this section. They will be considered later when dealing with the subject of placers.[73]

Article XI. Relocation of Forfeited or Abandoned Claims.

§ 402. Circumstances under which relocation may be made.
§ 403. New discovery not essential as basis of relocation.
§ 404. Relocation admits the validity of the original.
§ 405. Relocation by original locator.
§ 406. Relocation by one of several original locators in hostility to the others.
§ 407. Relocation by agent or others occupying contractual or fiduciary relations with original locator.
§ 408. Manner of perfecting relocations — Statutory regulations.
§ 409. Right of second locator to improvements made by the first.

§ 402. Circumstances under which relocation may be made.—In dealing with the subject of relocation, it is not our purpose at this time to enter into a critical

[71] Johnson v. Young, 18 Colo. 625, 629, 34 Pac. 173.

[72] Bergquist v. West Virginia & Wyoming Copper Co., 18 Wyo. 106, 106 Pac. 673, 677; Dean v. Omaha-Wyoming Oil Co. (Wyo., Jan. 7, 1913), 128 Pac. 881, 884.

[73] *Post*, § 459a.

discussion of the subject of abandonment, forfeiture, or the preservation of the estate from relocation by a resumption of work. The scope of this article is limited to the manner in which claims may be relocated after the rights based upon the original location are, by reason of the default of the owner in fulfilling the requirements of the law, subject to extinguishment by a new entry and a new location, or where the claim owner abandons the claim, thus restoring it to the public domain.[74]

The circumstances under which the estate created by the perfection of a valid location may be extinguished by hostile relocation, and the manner in which such estate may be preserved from such relocation by the delinquent original locator, will be fully explained in a succeeding title.[75]

For a failure to perform labor or make improvements to the value of one hundred dollars annually, computing the periods from the first day of January next succeeding the date of location, the federal law provides that—

> The claim or mine upon which such failure occurs shall be open to relocation in the same manner as if no location of the same had ever been made, *provided* that the original locators or their heirs, assigns, or local representatives, have not resumed work upon the claim after failure before such location.[76]

It is one of the essentials upon which the right to relocate exists that the contingency contemplated by the statute must have actually happened,—that is, there must have been a failure on the part of the original

[74] *Post*, § 644; Conn v. Oberto, 32 Colo. 313, 76 Pac. 369, 370.

[75] *Post*, tit. vi, ch. v, §§ 623–638; ch. vi, §§ 642–654.

[76] Rev. Stats., § 2324; 17 Stats. at Large, 92; Comp. Stats. 1901, p. 1426; 5 Fed. Stats. Ann. 19.

locator to perform the annual work. No relocation may be made to take effect in the future.[77]

The right of an original locator to amend his location for the purpose of correcting defects or embracing additional ground has been fully considered elsewhere.[78]

It is our present purpose to discuss the manner in which such relocations as are sanctioned by the federal law may be made and to whom the privilege of such relocation is extended.

§ 403. New discovery not essential as basis of relocation.—It is a well-established rule that there can be no valid location of a mining claim without a discovery;[79] but it has been held that it is not necessary that the locator should be the first discoverer of a vein, but it must not only be known to him, but must be adopted and claimed by him, in order to give validity to the location.[80]

So, if the original location was based upon a valid discovery, and the relocator finds the vein exposed within the limits of the claim, this is sufficient upon which to base a relocation.[81]

The theory of the law upon which the relocation is permitted is, undoubtedly, that if the original locator who made the discovery manifests his unwillingness to

77 Belk v. Meagher, 104 U. S. 279, 284, 26 L. ed. 735, 1 Morr. Min. Rep. 510. See *ante*, § 363; *post*, § 645a.

78 *Ante*, §§ 396–398.

79 *Ante*, § 335.

80 Nevada-Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 677; Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. 1029; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 108, 11 Fed. 666, 676, 4 Morr. Min. Rep. 411; Bay v. Oklahoma & Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936, 940; McMillen v. Ferrum M. Co., 32 Colo. 38, 105 Am. St. Rep. 64, 74 Pac. 461, 463; S. C., in error (dismissed), 197 U. S. 343, 346, 25 Sup. Ct. Rep. 533, 49 L. ed. 784.

81 Armstrong v. Lower, 6 Colo. 393, 395, 15 Morr. Min. Rep. 631.

proceed with the development of the ground, and his location becomes subject to forfeiture for failure to perform the necessary work, anyone may succeed to the right based upon the original discovery by relocating the ground, so that successive relocations based upon successive forfeitures may all be founded upon the one discovery. A new discovery is not requisite for each relocation.

§ 404. **Relocation admits the validity of the original.**—A relocation impliedly admits the validity of the prior location.[82] There can be no relocation unless there has been a prior valid location, or something equivalent, of the same property.[83]

The courts draw a distinction between a locator and relocator, classing the former as an original discoverer of mineral before unknown, and the latter as the mere appropriator of mineral discovered by another who had failed to exercise the privilege conferred upon him by law. The relocation, if avowedly made as such in the location notice,[84] is equivalent to an admission that the relocator claims a forfeiture by reason of a failure on the part of the first locator to comply with the law. Such being the case, the only inquiry is, as to whether or not the original locator performed the requisite labor.[85]

[82] Bakke v. Latimer, 3 Alaska, 95, 99; Zeiger v. Dowdy, 13 Ariz. 331, 114 Pac. 565, 566, 1 Water & Min. Cas. 409.

[83] Belk v. Meagher, 104 U. S. 279, 289, 26 L. ed. 735, 1 Morr. Min. Rep. 510; Cunningham v. Pirrung, 9 Ariz. 62, 80 Pac. 329, 330; Score v. Griffin, 9 Ariz. 295, 80 Pac. 331, 332; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36, 39; Ford v. Campbell, 29 Nev. 578, 92 Pac. 206, 209; Zerres v. Vanina, 134 Fed. 610, 614; S. C., in error, 150 Fed. 564, 80 C. C. A. 366; Clason v. Matko, 223 U. S. 646, 653, 32 Sup. Ct. Rep. 392, 56 L. ed. 588.

[84] Cunningham v. Pirrung, 9 Ariz. 62, 80 Pac. 329, 330; Score v. Griffin, 9 Ariz. 295, 80 Pac. 331, 332.

[85] Wills v. Blain, 4 N. M. 378, 20 Pac. 798, 802; Providence G. M.

However, where a location is made of a claim which, as a matter of fact, had been previously located, which fact was unknown to the later locator, there would be no estoppel to contest the validity of the original location.[86]

Most of the states have enacted laws governing relocations and prescribing the contents of relocation certificates. They are discussed in a succeeding section.[87]

§ 405. Relocation by original locators.—In speaking of relocation by an original locator, we have no reference to locations made for the purpose of curing defects, or readjusting boundaries. We have called these *amended* locations, and, as such, have dealt with them in the preceding article.[88] What we now refer to are cases wherein the original locator seeks to evade the requirements of the law as to development and annual expenditure, and endeavors to perpetuate his estate by periodical relocations.

The question was presented to the supreme court of Utah in the following form:—

> Can the locator of a quartz mining claim who has allowed his location to lapse by a failure to perform the necessary work make a relocation or new location covering the same ground?[89]

Co. v. Burke, 6 Ariz. 323, 57 Pac. 641; Jackson v. Prior Hill M. Co., 19 S. D. 453, 104 N. W. 207, 208.

[86] Murray v. Osborne (Nev.), 111 Pac. 31, 34, under a statute of that state.

[87] *Post*, § 408.

[88] *Ante*, §§ 396–398.

[89] Warnock v. De Witt, 11 Utah, 324, 40 Pac. 205. This case was appealed to the supreme court of the United States. The appeal was dismissed for failure to comply with rule 10. Mem. Dec., 18 Sup. Ct. Rep. 949.

The court failed to see any reason why such right should be denied. It based its ruling upon the following grounds:—

(1) That right is recognized by the circuit court of the ninth circuit[90] and by the land department;[91]

(2) The fact that a prior locator, after his right has lapsed, may renew it by resuming work, would appear to be a favor or right granted to such prior locator, but to deny him the right to relocate is to deny him a privilege which is given to *strangers*.

The conclusion of the court is, that the prior locator, in addition to the right to resume work, and thus relieve himself from the danger of incurring forfeiture, should also have the same rights as strangers to relocate.

We are fully aware of the weight to be given to the decisions of the supreme court of a state or territory, and for that reason it is with a great deal of hesitancy that we intrude our individual views in opposition to such a decision, in the absence of some authoritative ruling emanating from a court of equal dignity to support our theories. But the rule announced by the supreme court of Utah is so opposed to what we consider the true intent and spirit of the mining laws, that we feel justified in criticising it, and in doing so to deferentially present our reasons for upholding a contrary doctrine.

In the first place, we think the fallacy of the rule is exposed upon the face of the decision, *ex visceribus suis*, considering the cases cited in it as a part of the decision:—

The doctrine asserted by the supreme court of Utah, we respectfully urge, is *not* recognized by the circuit

[90] Hunt v. Patchin, 35 Fed. 816, 818, 13 Saw. 304.

[91] Acting Commissioner Holcomb, Copp's Min. Lands, p. 300.

court of the ninth circuit in the case of Hunt v. Patchin.[92] That case involved a question between original colocators, one of whom, by common consent of all, had relocated the claim in his own name, and afterward undertook to claim the entire title as against his original cotenants. This the court would not permit him to do. Under these circumstances, the relocating cotenant could not, with any advantage to himself, deny the validity of the relocation, nor could he exclude his cotenants from participating in such title as he acquired. In this case, a certificate of purchase was issued to the relocating claimant alone. The validity of the relocation was never questioned by the land department, which tribunal was probably never advised that the basis of the relocation was the dereliction of the relocator and his cotenants. All that Hunt v. Patchin attempts to determine is, that whatever right accrues to one of several original locators under a relocation which is made in his name, by common consent, inures to the benefit of all. But that any such right accrues, the circuit court did not attempt to decide.

The ruling of the land department referred to[93] appears in the form of a letter addressed by Acting Commissioner Holcomb to a man in Leadville. It was not a litigated case. The acting commissioner was of the opinion that one of several colocators, all of whom are in default, may relocate in his own name and hold it adversely to his former cotenants.

As to the conclusion reached by the supreme court of Utah, there is every reason why the right to relocate should be given to strangers and should be denied to the original locator. Under the mining laws, discovery and appropriation are recognized as the sources of title

[92] 35 Fed. 816, 13 Saw. 304.

[93] Copp's Min. Lands, p. 300.

to mining claims, and *development* by *working* as the condition of continued ownership until patent is obtained.[94]

The supreme court of the United States has said that the object of the statute as to performance of annual work is

> to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith and to show that he was not acting in the principle of "dog in the manger."[95]

The decision of the Utah court encourages the "dog in the manger" practice by the indolent locator, and everyone familiar with local conditions in the mining regions knows to what extent the chronic delinquent avails himself of the invitation contained in this decision.

After his discovery, the locator is allowed certain periods to perfect his location, and the period of one year from the first day of January next succeeding the date of his location in which to perform one hundred dollars' worth of labor.

Let us illustrate: A vein is discovered June 1, 1900. The locator has until January 1, 1902, in which to perform his work. He fails to do so; but on January 2, 1902, relocates the claim, basing his right to do so upon his own previous neglect to comply with the law. If he has the same right as a stranger to relocate under these circumstances, he has the same length of time allowed to a stranger to perform the first year's labor after the date of the relocation; that is, until January 1, 1904. On January 2, 1904, he may repeat this proceeding,

[94] Erhardt v. Boaro, 113 U. S. 527, 535, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472.

[95] Chambers v. Harrington, 111 U. S. 350, 355, 4 Sup. Ct. Rep. 428, 28 L. ed. 452.

and obtain an additional two years, and so on indefinitely. It seems to us that this is a manifest fraud upon the government. It is a perversion of the law, and in direct violation of its spirit and intent, to say that the original locator may take advantage of his own dereliction, and use his own neglect and wrong as a foundation to either perpetuate an estate or create a new one. The law under which he obtained his first privilege provides the only method by which his neglect can be condoned, and that is by resuming work prior to relocation. It is illogical to say that he may accomplish this result in any other way than by strictly pursuing the methods provided for by the statute.

There is another principle which seems to us to be decisive of the question: The forfeiture is not complete until a relocation has been made. It is the entry of a new claimant with intent to relocate the property, and not mere lapse of time, that terminates the right of the original claimant.[96]

The supreme court of California says:—

> It is not provided that a mere failure to comply with the statutory requirement shall terminate the locator's right; the sole effect of such failure is to throw the land open to location *by others*, and in the absence of such other location the original claimant's right to resume work and to hold his claim remains.[97]

The right to enter and resume work prior to the relocation by another is evidence that the original estate is not wholly lost by the failure to do the work.[98]

[96] Little Gunnell M. Co. v. Kimber, 1 Morr. Min. Rep. 536, 539, Fed. Cas. No. 8402; Co-operative Copper & Gold M. Co. v. Law (Or., May 27, 1913), 132 Pac. 521, 522.

[97] Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176, 178. Italics in the quotation are the author's.

[98] Lakin v. Sierra Buttes G. M. Co., 25 Fed. 337, 343, 11 Saw. 231, 241.

The supreme court of Colorado thus forcibly states the rule:—

> As between the locator and the general government the failure to do the annual assessment work does not result in a forfeiture. In other words, it is not necessary to perform the annual labor except to protect the rights of the locator against parties seeking to initiate a title to the same premises. . . . . To otherwise express our views, it might be said that after a valid location the title thus acquired remains so, whether the annual assessment work is performed or not, until forfeited or abandoned.[99]
>
> Forfeiture is not complete until *someone else* has appropriated the property.[100]

This is in accord with the views of the land department.[1]

If this doctrine be true, that the estate of the original locator, as between himself and the government, remains unimpaired by the failure to perform the work, how is it possible for such locator to terminate such estate and create a new one. He ought not to be permitted to periodically re-enter and oust himself, predicating such re-entry and ouster on his own delinquency, to save the necessity of developing his claim.

To say that the original locator has the power within himself to make effectual a forfeiture arising from his own delinquency by perfecting a relocation, is to place in his hands the extraordinary privilege of holding

99 Beals v. Cone (on rehearing), 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 958.

100 McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 593, 50 L. R. A. 184; Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 86, 68 L. R. A. 833, to which there is a note discussing this question (p. 842); Cunningham v. Pirrung, 9 Ariz. 62, 80 Pac. 329, 330; Snowy Peak M. Co. v. Tamarack Chesapeak M. Co., 17 Idaho, 630, 107 Pac. 60, 61. *Post*, § 645.

1 Wilson v. Champagne M. Co., 29 L. D. 491; Coleman v. McKenzie, 29 L. D. 359.

mineral lands perpetually, without doing any work whatever,[2] at least in those states where the relocator is not required to do preliminary work.[3] Where he is required to perform such work, such performance might be treated as resumption, and no relocation is necessary. In any event, the rule upon this subject should be uniform, because it is based upon the federal statute.

As was said by the supreme court of California, the work prescribed in the act must be done, or the claim is open to relocation, unless work is resumed before the second location is made. The conditions imposed by the act of congress are wise and salutary, and are by no means onerous. "It is the duty of the courts to hold the locators of mining claims bound by them."[4]

The right to relocate is given to others as a *penalty* imposed on the original locator for failure on his part to perform the conditions required of him. It is not conceded to him as a reward for his neglect, or as an inducement held out to him to evade the law.

There are several cases which may be said to support, inferentially at least, the doctrine of the Utah case, under discussion. These cases deserve consideration.

Saunders v. Mackey[5] was an action to quiet title to a mining claim, where one cotenant, after having agreed with his co-owners to represent the claim, failed to do so, and relocated in his own name, to the exclusion of his associates. The court suggested that the excluded cotenant had mistaken his remedy, which was either an action for damages, or to erect a trust, but

2 Text quoted in Ingemarson v. Coffey, 41 Colo. 407, 92 Pac. 908, 911.

3 McCann v. McMillan, 129 Cal. 350, 62 Pac. 31, 32.

4 Russell v. Brosseau, 65 Cal. 605, 608, 4 Pac. 643, 645; Du Prat v. James, 65 Cal. 555, 4 Pac. 562, 563, 15 Morr. Min. Rep. 341; Wright v. Killian, 132 Cal. 56, 64 Pac. 98, 99.

5 5 Mont. 527, 6 Pac. 361, 362.

held that the relocation was valid. The decision of the court seems to have been based upon the theory that the failure to perform the annual work *ipso facto* restored the lands to the public domain, a theory which is not supported by the weight of authority.

Lockhart v. Wills[6] and Lockhart v. Johnson[7] arose out of facts analogous to those of Saunders v. Mackey, with one important distinction. The location in the latter cases was never perfected in the original instance. The preliminary notices were posted by one in the name of all the co-owners, but there was a failure to perform the acts required by the laws of New Mexico as a condition precedent to the creation of a valid location. After the lapse of the statutory period, within which the necessary acts were required to be performed, the cotenant who initiated the location conspired with other parties to make a location excluding his original cotenants. This location was made and perfected, and the excluded original associates brought ejectment. The courts held the later location valid. In fact, it was the only location which had ever been perfected. They further held that, under the circumstances, ejectment was not the proper remedy. In a suit in equity subsequently brought to erect a trust it was determined by the supreme court of the United States that a trust *ex maleficio* arose which could be enforced.[8]

In the case of Conway v. Hart[9] a claim had been abandoned for several years, when the original owners

[6] 9 N. M. 344, 54 Pac. 336, 340.

[7] 181 U. S. 516, 527, 21 Sup. Ct. Rep. 665, 45 L. ed. 979. This case is commented on and principle applied in Bergquist v. West Virginia Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673, 682.

[8] Lockhart v. Leeds, 195 U. S. 427, 25 Sup. Ct. Rep. 76, 49 L. ed. 263; Lockhart v. Washington G. & S. M. Co., 16 N. M. 223, 117 Pac. 833, 836.

[9] 129 Cal. 480, 62 Pac. 44, 45.

returned, relocated and resumed work. The court held the second location to be valid as against one made later by third parties. The case does not discuss any of the basic principles involved in the ultimate anaylsis of the subject under discussion.

The case of Legoe v. Chicago Fishing Co.[10] was a case involving the right of a locator of a "fishing site" to relocate his claim after having failed to mark it as prescribed by the local statute. The court followed the doctrine of the Utah case of Warnock v. De Witt after referring to, commenting on and declining to follow the author's analysis of the subject as it appeared in the second edition of this work. The analogy between fishing and mining claims is not striking, the two statutes are dissimilar and the decision is not overwhelmingly persuasive.

Leedy v. Lehfeldt[11] was a case where the original locator claimed to have relocated after midnight, December 31st, a claim which he had previously located but upon which he failed to do the assessment work. A stranger relocated on January 1st, at 10:30 A. M., and introduced proof that there were no new stakes on the claim. The original locator had judgment in the trial court, but it was reversed for error in admitting improper testimony. The question discussed in this section was not raised.

In Bergquist v. West Virginia & Wyoming Copper Co.[12] the question is referred to but not decided.

The supreme court of Colorado, however, supports the doctrine contended for by the author, quotes from the text of this section as it appeared in the second edition, and applies the rule to the performance of prelim-

10 24 Wash. 175, 64 Pac. 141, 143.
11 162 Fed. 304, 89 C. C. A. 184.
12 18 Wyo. 234, 106 Pac. 673, 682.

inary development work. The court holds that a discoverer or locator cannot, by posting new notices or changing the dates in old ones prevent the ground from being relocated by others after the lapse of the sixty-day period from the date of discovery or first notice.[13] Mr. Morrison concurs with the author's views, and points out a legislative construction by congress by insertion at the proper context of the words "open to location *by others*" in the special act concerning annual labor on placer claims in Alaska.[14]

California has a statute which disqualifies a delinquent locator from relocating within a period of three years from the date of the original location,[15] and Montana inhibits such locations altogether.[16] This legislation, however, is subject to the criticism that it conflicts with the federal law. If under that law an original locator may relocate his claim, having failed to perform the annual work, it is doubtful if the state can deprive him of that privilege for any period or at all.

The foregoing cases are all which have come under our observation which lend any aid to the solution of the problem. It may be that the doctrine of Warnock v. De Witt is the correct one. But we are not able to reconcile it with the principles announced by other courts of equal dignity, which principles are necessarily involved in the determination of the question here discussed.

§ 406. Relocation by one of several original locators in hostility to the others.—If we are right in the con-

[13] Ingemarson v. Coffey, 41 Colo. 407, 92 Pac. 908, 910. See, also, Eureka Exp. Co. v. Tom Moore M. & M. Co. (Colo.), 123 Pac. 655, 656.

[14] Morrison's Mining Rights, 14th ed., p. 147.

[15] Civ. Code, § 1426s.

[16] Rev. Code 1907, § 2289.

clusions reached in the preceding section, that the original locator cannot treat his failure to perform or resume work as the basis of a valid relocation, it must necessarily follow, that neither one nor any number of several locators who are delinquent in the performance of the annual work would be permitted to make a relocation based upon such delinquency. If we are wrong in the deductions previously stated, it follows that a delinquent colocator may relocate the claim, subject to such redress as the courts will afford the excluded co-owner.

The supreme court of Montana has held that mining claims owned by several in common must be "represented"—that is, the work must be performed—as if owned by one person; that "representation" is a unity; that co-owners may cause representation work to be done on the claim according to their respective interests, but when completed it must amount to one whole representation; otherwise, the claim is not protected from relocation, and that under such circumstances one of the co-owners might relocate.[17] If this be a correct statement of the rule, it is manifestly subject to the limitations pointed out by the decision of the supreme court of the United States announced in Turner v. Sawyer,[18] wherein it is said that the general rule, that the purchase of an outstanding title, or encumbrance, upon the joint estate for the benefit of one tenant in common inures to the benefit of all, because there is an obligation between them arising from their joint claim and community of interest, and that one of them shall not affect the claim to the prejudice of

[17] Saunders v. Mackey, 5 Mont. 523, 6 Pac. 361, 362.

[18] 150 U. S. 578, 586, 14 Sup. Ct. Rep. 192, 37 L. ed. 1189, 17 Morr. Min. Rep. 683.

others,[19] should apply to a case where one cotenant of a mining claim secures the entire title in his individual name.[20]

The courts generally concede the rule to be, that where one of several co-owners in a mining claim applies for a patent in his own name, the excluded cotenants are not adverse claimants within the meaning of the law requiring them to intervene in patent proceedings, as they claim equities which are based upon the legal title thus conveyed.[21]

The land department rulings are now in harmony with this doctrine.[22]

The supreme court of Colorado announces the following rule which seems to embody all the foregoing principles:—

> A co-owner who amends the location notice, relocates the claim or procures the issuance of a patent in his name will not be permitted to thus exclude the other owners and appropriate the claim to himself, but will be declared to hold the right or title thereby acquired in trust for all, ... nor will the trust be avoided or its enforcement defeated merely because a stranger to the original claim participates

19 For a general discussion of rights and remedies between cotenants or co-owners, see *post*, §§ 788–793.

20 Followed in McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 593, 50 L. R. A. 184; S. C., second appeal, 12 S. D. 7, 80 N. W. 135; Van Wagenen v. Carpenter, 27 Colo. 444, 61 Pac. 698, 702; Perelli v. Candiani, 42 Or. 625, 71 Pac. 537; Stevens v. Grand Central M. Co., 133 Fed. 28, 30, 67 C. C. A. 284. See, also, Ballard v. Golob, 34 Colo. 417, 83 Pac. 376, 379; Stephens v. Golob, 34 Colo. 429, 83 Pac. 381; Lockhart v. Leeds, 195 U. S. 427; Freeman on Cotenancy, § 151.

21 Sussenbach v. First National Bank, 5 Dak. 477, 41 N. W. 662, 667; Brundy v. Mayfield, 15 Mont. 201, 38 Pac. 1067; Doherty v. Morris, 11 Colo. 12, 16 Pac. 911, 912; Stevens v. Grand Central M. Co., 133 Fed. 28, 30, 67 C. C. A. 284; Harrison v. Cole, 50 Colo. 470, 116 Pac. 1123, 1126.

22 Thomas v. Elling, 25 L. D. 495; S. C., on review, 26 L. D. 220; Coleman v. Homestake M. Co., 30 L. D. 364; *post*, § 728.

with the unfaithful co-owner in the proceedings to wrongfully exclude his companions in interest.[23]

This is essentially the doctrine approved by the supreme court of the United States.[24]

Be that as it may, although the views announced by the supreme court of Montana seem to give support to the doctrine of the supreme court of Utah, cited in the preceding section, we cannot see why the reasoning applied by us in that section to the case of an individual locator should not apply with equal force to all the co-locators. In the latter case the obligation rests upon all alike to perform the required work. One of the co-tenants might save the entire estate by himself performing the labor. In such event, he would have a right of contribution against his cotenants for their proportion of expenditures made to save the common estate,[25] which he might assert, either in an action for partition,[26] or by "advertising out" under the provisions of the Revised Statutes,[27] and it is possible that this is the exclusive remedy afforded the diligent cotenant.[28] But to say that one co-owner can make his own delinquency, as well as that of his cotenants, the basis for acquiring a new title, seems to us repugnant to the intent and spirit of the law.[29]

Possession of one cotenant is possession of all, and will inure to the benefit of all until he should by some

[23] Stevens v. Grand Central M. Co., 133 Fed. 28, 30, 67 C. C. A. 284.

[24] Lockhart v. Leeds, 195 U. S. 427, 25 Sup. Ct. Rep. 76, 49 L. ed. 263.

[25] See Beck v. O'Connor, 21 Mont. 109, 53 Pac. 94, 96; Oliver v. Lassing, 57 Neb. 352, 77 N. W. 802, 804. See Smith v. Smith, 150 N. C. 81, 63 S. E. 177, 178; McSorley v. Lindsay, 62 Wash. 203, 113 Pac. 267, 268.

[26] Holbrooke v. Harrington (Cal.), 36 Pac. 365, 366.

[27] § 2324; Faubel v. McFarland, 144 Cal. 717, 78 Pac. 261, 262.

[28] McDaniel v. Moore, 19 Idaho, 43, 112 Pac. 317, 319; *post*, § 646.

[29] Consult Royston v. Miller, 76 Fed. 50.

notice, actual or constructive, indicate to the others that such possession was hostile or adverse.[30]

§ 407. Relocation by agent or others occupying contractual or fiduciary relations with original locator.—An agent, trustee, or other person holding confidential relations with the original locator, will not be permitted to relocate mining claims, and secure to himself advantages flowing from a breach of trust obligations.[31]

This rule, however, it would seem, does not apply to the wife of a co-owner who relocates, in the absence of evidence showing the relocation to have been made under some agreement with the husband which amounted to a fraud.[32]

The general rule is that an agent cannot make a profit for himself out of the business in which he is engaged for his principal or make use of the information obtained through his employment to acquire interests in the subject matter of his agency adverse to those of his principal.[33]

[30] Faubel v. McFarland, 144 Cal. 717, 78 Pac. 261.

[31] O'Neill v. Otero, 15 N. M. 707, 113 Pac. 614; Lockhart v. Rollins, 2 Idaho, 503, 514, 21 Pac. 413, 416, 16 Morr. Min. Rep. 16; Utah M. & M. Co. v. Dickert & M. S. Co., 6 Utah, 183, 21 Pac. 1002, 5 L. R. A. 259; Largey v. Bartlett, 18 Mont. 265, 44 Pac. 962, 965; Fisher v. Seymour, 23 Colo. 542, 49 Pac. 30, 33; Argentine M. Co. v. Benedict, 18 Utah, 183, 55 Pac. 559; Haws v. Victoria Copper Co., 160 U. S. 303, 316, 16 Sup. Ct. Rep. 282, 40 L. ed. 436; Van Wagenen v. Carpenter, 27 Colo. 444, 61 Pac. 698, 701. See, also, Bunker Hill Co. v. Pascoe, 24 Utah, 60, 66 Pac. 574, 575. Text quoted in Co-operative Copper & Gold M. Co. v. Law (Or., May 27, 1913), 132 Pac. 521, 522.

[32] Helstrom v. Rodes, 30 Utah, 122, 83 Pac. 730, 731.

[33] Calumet Gold M. & Mill. Co. v. Phillips, 31 Colo. 267, 72 Pac. 1064, 1066, 22 Morr. Min. Rep. 677. In this case a mining superintendent having discovered the existence of vein in a shaft sunk on his employer's claim, the apex of which was outside of such claim, purchased on his own account the ground containing the apex. It was held

One in possession of an unpatented mining claim entering under a lease from the owner will not be permitted to relocate for nonperformance of assessment work on the part of the owner.[34] Title conveyed by a patent issued to such lessee or his "dummy" predicated upon a relocation made under such circumstances will be held in trust for the true owners.[35] Where, however, a contractual or fiduciary relationship is terminated, the rule no longer applies, and a subsequent relocation by the former agent or trustee has been upheld.[36] An original locator cannot suffer forfeiture and relocate, or cause the ground to be relocated by others in collusion with him, so as to cut off the rights of a mortgagee under a mortgage executed by such original locator.[37]

A relocation of claims previously owned by a corporation made by a third party in collusion with stockholders of the corporation in order to defeat the title of an execution purchaser, based upon a valid judgment against the corporation, is fraudulent.[38]

The attempt of an agent employed to do annual assessment work in a mining claim, after failure or intentional neglect to do such work, to relocate the claim, even though such attempted location is made in the name of a third party from whom the agent subsequently obtains title by deed, is a fraud on his princi-

that such acquisition by the superintendent was not in the property of the employer or adverse to their interests. It was therefore upheld.

[34] Justice M. Co. v. Barclay, 82 Fed. 554, 559; Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123.

[35] Stewart v. Westlake, 148 Fed. 349, 78 C. C. A. 341.

[36] Page v. Summers, 70 Cal. 121, 12 Pac. 120, 121, 15 Morr. Min. Rep. 617.

[37] Alexander v. Sherman, 2 Ariz. 326, 16 Pac. 45, 46, 15 Morr. Min. Rep. 638.

[38] Wailes v. Davies, 158 Fed. 667; S. C., on appeal, 164 Fed. 397, 90 C. C. A. 385.

pal. The agent will be charged in equity with a trust *ex maleficio*.[39]

It has been suggested by the supreme court of Arizona that an original locator, after sale by quitclaim deed to a third person who fails to perform the annual labor, may relocate and hold the claim.[40] But in such case the obligation to perform the labor rested upon his grantee, and not upon the original locator, and by relocating he does not profit by his own failure to perform the work. His grantee occupies the position of the original locator, and the latter, in relocating, that of a mere stranger to the title.

§ 408. **Manner of perfecting relocations—Statutory regulations.**—With the exception of the necessity for making a new discovery, the relocation of an abandoned mining claim is made in substantially the same manner as the original.[41]

The abandoned ground is "open to relocation in the same manner as if no location of the same had ever been made."[42] By this is meant that all the requirements of the law as to marking of boundaries, posting notices, recording certificates, performance of development work, and such other acts as are required by the federal or state laws, except the discovery, must be complied with in cases of relocation to the same extent as in original locations, except where the local statutes provide for alternative equivalents. The original loca-

39 O'Neill v. Otero, 15 N. M. 707, 113 Pac. 614.

40 Blake v. Thorne, 2 Ariz. 347, 16 Pac. 270, 271.

41 Armstrong v. Lower, 6 Colo. 393, 15 Morr. Min. Rep. 631.

42 Rev. Stats., § 2324; 17 Stats. at Large, 92; Comp. Stats. 1901, p. 1426; 5 Fed. Stats. Ann. 19.

tor and the relocator, in this respect, are on the same footing.[43]

A relocator may adopt stakes and monuments of a former location if they are still on the ground,[44] in the absence of a statute specially authorizing it, provided the law in force in the state does not require new marking, as it does in some of the states.

Most of the precious metal bearing states have legislated upon the subject of relocating abandoned claims.

Colorado has enacted a law[44a] which provides that the relocation of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries, in the same manner as if it were the location of a new claim; or the relocator may sink the original shaft ten feet deeper than it was at the time of the abandonment, and erect new, or adopt old, boundaries, renewing the posts, if removed or destroyed. In either case, a new location stake shall be erected. Arizona,[45] Idaho,[46] Montana,[47] Nevada,[48] New Mexico,[49] North Dakota,[50] South

[43] Pelican & Dives M. Co. v. Snodgrass, 9 Colo. 339, 342, 12 Pac. 206, 208.

[44] Conway v. Hart, 129 Cal. 480, 62 Pac. 44, 45; Brockbank v. Albion M. Co., 29 Utah, 367, 81 Pac. 863, 864; Bergquist v. West Virginia & Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673, 680; Riverside Sand & Cement Co. v. Hardwick, 16 N. M. 479, 120 Pac. 323, 324.

[44a] Mills' Annot. Stats., § 3162; Rev. Stats. 1908, § 4211; Annot. Stats. 1911, p. 515.

[45] Rev. Stats. 1901, § 3241; amended 1907, p. 27.

[46] Laws 1895, p. 25, § vii; Civ. Code 1901, § 2560; Rev. Code 1907, § 3212.

[47] Rev. Code 1895, § 3615; amended 1907, p. 18; Rev. Code 1907, § 2286.

[48] Comp. Laws 1900, § 214; Rev. Laws 1912, § 2428.

[49] Laws 1889, p. 42, § iii; Comp. Laws 1897, § 2300.

[50] Rev. Code 1895, § 1439; Id. 1899, § 1439; Id. 1905, § 1813.

Dakota,[51] Washington,[52] and Wyoming,[53] have statutes of the same general character with occasional variations as to details. There is no legislation upon the subject in either California, Oregon or Utah.

With reference to the certificate of relocation of abandoned ground, some of the states[54] provide that it *may* contain a statement that the location is in whole or in part of abandoned ground. The use of the word "may" is permissive, and not mandatory. A certificate which does not contain such a statement is not for that reason defective.[55]

In other states[56] it is provided that the certificate *must* or *shall* state that the whole or any part of the new location covers abandoned ground. Laws of this character have been held to be mandatory, where the relocator relied upon the abandonment of a prior valid location. Where it was contended that the original location was invalid, the recital was not required to be included in the certificate. In such case the only issue is as to the validity of the original location.[57]

51 Comp. Laws Dak. 1887, § 2010. Adopted by South Dakota—Laws 1890, ch. cv; Grantham's Annot. Stats. S. D. 1899, § 2669; Rev. Pol. Code 1903, § 2545.

52 Laws 1899, p. 69, § 8; Rem. & Bal. Codes 1909, § 7365; National Mill & M. Co. v. Picolo, 54 Wash. 617, 104 Pac. 128, 129; reversed on rehearing, 57 Wash. 572, 107 Pac. 353, 354; Paragon M. & D. Co. v. Stevens County Exp. Co. (Wash.), 87 Pac. 1068.

53 Laws 1888, p. 89, § 21; Rev. Stats. 1899, § 2552; Comp. Stats. 1910, § 3473.

54 Nevada and Wyoming.

55 Carlin v. Freeman, 19 Colo. App. 334, 75 Pac. 26, 27. A similar statute was in force in Colorado, until repealed in 1911. Stats. 1911, p. 515.

56 North Dakota, South Dakota, Washington.

57 Cunningham v. Pirrung, 9 Ariz. 62, 80 Pac. 329, 330; Score v. Griffin, 9 Ariz. 295, 80 Pac. 331, 332; Matko v. Daley, 10 Ariz. 175, 85 Pac. 721, 723. A similar statute was in force until March 12, 1907, at which time it was repealed. Sess. Laws 1907, p. 27. But as the

A location notice omitting the statement may be amended and relate back to the original in the absence of intervening rights.[58] Where the second locator is not aware that the ground had been previously located and there is nothing observable on the ground to put him on inquiry, it is not probable that the failure to insert the recital in the certificate would defeat his location, or prevent him from attacking the validity of the original location or establishing a subsequent abandonment. This rule is established by statute in Nevada.[59] The intention to adopt the markings of a prior location may be inferred from the circumstances surrounding the relocation.[60]

As a relocator is required to perform the same acts in their logical sequence as an original locator, and that necessarily some time must elapse before all the acts can be completed, he should be allowed the same privileges in this behalf as are accorded an original locator. He should be, and undoubtedly is, in most of the states at least, protected in his possession as against the original locator who seeks to resume after the relocator has taken the initial step and before he has taken the final one. The question as to the extent of the relocator's rights pending the perfection of his location may

supreme court has held that the rule was applicable to locations made prior to the repeal (Clason v. Matko, 12 Ariz. 213, 100 Pac. 773, 774, affirmed on appeal, 223 U. S. 646, 652–655, 32 Sup. Ct. Rep. 392, 56 L. ed. 588), the legislature on March 18, 1909, passed an act which provided that no relocation of an abandoned mining claim made prior to March 12, 1907, shall be held invalid upon the ground that it failed to contain the recital. See, also, Paragon M. & D. Co. v. Stevens County Exp. Co., 45 Wash. 59, 87 Pac. 1068, and Peachy v. Frisco Gold Mines Co., 204 Fed. 659, 667.

58 Kinney v. Lundy, 11 Ariz. 75, 89 Pac. 496.

59 Murray v. Osborne (Nev.), 111 Pac. 31, 33.

60 Bergquist v. West Virginia & Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673, 680.

at this time, by reason of the supplemental state legislation on the subject, be somewhat academic. But the discussion may present something of historical value, and possibly in some localities be a matter of serious moment.

The supreme court of Montana at one time held that if an original locator resumes work before the relocator re-marks the boundaries and performs all the acts required to perfect a valid relocation, the forfeiture is not worked and the right to complete the relocation is lost,[61] which doctrine obtained in that state[62] until 1907, when the legislature overruled it by passing an act which provided that—

> The rights of a relocator of any abandoned or forfeited mining claim hereafter relocated shall date from the posting of his notice of location thereon, and, while he is duly performing the acts required by law to perfect his location, his rights shall not be affected by any re-entry or resumption of work by the former locator or claimant.[63]

The supreme court of California at a time when it was sponsor for the rule that no appreciable time was allowed an original locator in which to perfect his location,[64] adopted the views announced by the Montana courts.[65] Latterly the California courts announced that it was conceded that the discoverer has a reasonable time in which to complete the location.[66]

61 Gonu v. Russell, 3 Mont. 358; McKay v. McDougall, 25 Mont. 258, 87 Am. St. Rep. 395, 64 Pac. 669, 671.

62 Thornton v. Kaufman, 40 Mont. 282, 135 Am. St. Rep. 618, 106 Pac. 361, 362.

63 Stats. 1907, p. 18, § 5, p. 21; Rev. Code 1907, § 2287.

64 *Ante*, § 339.

65 Holland v. Mt. Auburn G. Q. M. Co., 53 Cal. 149, 9 Morr. Min. Rep. 497; Belcher Cons. G. M. Co. v. Deferrari, 62 Cal. 160; Pharis v. Muldoon, 75 Cal. 284, 17 Pac. 70, 15 Morr. Min. Rep. 348. See, also, Klopenstine v. Hays, 20 Utah, 45, 57 Pac. 712.

66 McCleary v. Broaddus, 14 Cal. App. 60, 111 Pac. 125, 127.

We are impressed with the conviction that the correct rule has always been in consonance with the statutory declaration of the legislature of Montana found in the act of 1907 above referred to.

Where, under statutes which either contemplate or provide for a series of acts, the performance of which necessarily requires time, such as the sinking of a new discovery shaft ten feet deep, or an old one ten feet deeper, the performance of any one of these acts in the series ought to give the relocator the necessary time to complete the others. Otherwise, it is difficult to see how a valid relocation could ever be made, without the consent of the original locator. He could "resume work" at any time before the relocator had completed his development. Unless the relocator can be protected in his possession, for the purpose of completing his relocation, there is but little use in his attempting it. Each attempt at relocation would, at some stage, find the original locator in a state of "resumption." While forfeitures are odious, we think the courts are sometimes altogether too lenient in dealing with a class of people frequently found in mining camps, who will neither work themselves nor permit others to do so.

Judge Hallett was of the opinion that the right of the original locator to resume work and prevent forfeiture lapses, unless the right is exercised before another has taken possession of the property with intent to relocate it,[67] and Mr. Morrison shares these views,[68] which, in our judgment, are sound.[69]

[67] Little Gunnell M. Co. v. Kimber, 1 Morr. Min. Rep. 536, Fed. Cas. No. 8402.

[68] Morr. Min. Rights, 10th ed., p. 91, 14th ed., p. 125.

[69] The supreme court of Montana discusses this section as it appeared in the second edition, and disagrees with the conclusions reached. McKay v. McDougall, 25 Mont. 258, 87 Am. St. Rep. 395, 64 Pac. 669, 672. Evidently the legislature of Montana accepted the author's views as to

A discussion of what constitutes "resumption" is deferred for treatment in another chapter.[70] Successive relocations may, of course, be made as often as the relocators fail on their part to comply with the law. Where one has made a relocation and permits the time to elapse without performing the requisite work, he should be debarred the same as an original locator from again relocating. Whether or not such is the law depends upon the correctness of our theories advanced in a preceding section.[71]

§ 409. **Right of second locator to improvements made by the first.**—When the estate of the first locator becomes extinguished by his failure to comply with the law, and the second enters and perfects his relocation, the dominion and control over the property passes to the latter. If the former thereafter remains in possession, unless at the time of the relocation he had resumed work, he is a mere occupant without color of title, and the completion of the second location, if effected peaceably and in good faith, operates in law as an ouster of the prior occupant.[72] Thereafter, the relocator is clothed with "the exclusive right of possession and enjoyment of all the surface included within the lines of the location."[73]

Such improvements or betterments as have been placed upon the property by the original locator, if

what should be the rule and reversed the courts by passing the act of 1907 referred to in the text *supra*.

[70] *Post*, § 652.

[71] *Ante*, § 405.

[72] Belk v. Meagher, 3 Mont. 65, 80, 1 Morr. Min. Rep. 522; S. C., on appeal, 104 U. S. 279, 284, 26 L. ed. 735, 1 Morr. Min. Rep. 510; *ante*, §§ 218, 219.

[73] Rev. Stats., § 2322; 17 Stats. at Large, 91; Comp. Stats. 1901, p. 1425; 5 Fed. Stats. Ann. 13.

they fall within the class designated as fixtures, become a part of the realty, and the subsequent appropriation of the land carries with it, necessarily, whatever may be affixed to it. Prior to the determination of his estate by the perfection of a relocation, it cannot be doubted that the prior locator may sever and remove all machinery, buildings, and other improvements which, by the manner of their attachment to the soil, have become a part of the freehold. But his right of entry for that purpose ceases when his estate is terminated.

It is a general rule of law that all improvements of this character upon public lands of the United States pass to the purchaser from the government,[74] and the relocator of a mining claim holds his estate by purchase.[75] One cannot set up equities in improvements against the government, or a purchaser from it,[76] and state statutes which permit their removal after the land has passed into private ownership are void, as interfering with the primary right of disposal of the soil reserved to the United States upon the admission of the several states.[77]

It is unnecessary to enter into a detailed discussion of what constitutes fixtures. It has been frequently held that machinery, such as engines, boilers, hoisting-

[74] Collins v. Bartlett, 44 Cal. 371, 384; Pennybecker v. McDougal, 48 Cal. 160, 163; McKiernan v. Hesse, 51 Cal. 594; Treadway v. Sharon, 7 Nev. 37; Winans v. Beidler, 6 Okl. 603, 52 Pac. 405; Hiatt v. Brooks, 17 Neb. 33, 22 N. W. 73, 75; Hill v. Pitt, 2 Neb. (Unof.) 151, 96 N. W. 339.

[75] Meyerdorf v. Frohner, 3 Mont. 282, 320, 5 Morr. Min. Rep. 559; *ante*, § 233.

[76] Deffeback v. Hawke, 115 U. S. 392, 407, 6 Sup. Ct. Rep. 95, 29 L. ed. 423; Sparks v. Pierce, 115 U. S. 408, 413, 6 Sup. Ct. Rep. 102, 29 L. ed. 428.

[77] Collins v. Bartlett, 44 Cal. 371, 384.

works, mills, pumps, and things of a like character annexed to the soil for mining, become part of the freehold.[78] As such, they will pass to the relocator.

While this is undoubtedly true, upon application for a patent the relocator will not be permitted to include in his estimate of the value of improvements required by law to be made as a condition precedent to patent any of the labor done or improvements made by the original locator.[79]

A grant from the original locator to one who has effected a valid relocation is ineffective for this purpose.[80]

Expenditures for such purpose must have been made by the *relocator* or those deraigning title through him.[81]

Article XII. Lodes Within Placers.

§ 413. Right to appropriate lodes within placers.
§ 414. Manner of locating lodes within placers.
§ 415. Width of lode locations within placers.

§ 413. Right to appropriate lodes within placers.— That the two classes of mineral deposits, those falling within the designation of lodes, or veins, and those

[78] Merritt v. Judd, 14 Cal. 60, 67, 6 Morr. Min. Rep. 62; Treadway v. Sharon, 7 Nev. 37; Roseville Alta M. Co. v. Iowa G. M. Co., 15 Colo. 29, 22 Am. St. Rep. 373, 24 Pac. 920, 921, 16 Morr. Min. Rep. 63; Arnold v. Goldfield Third Last Chance, 32 Nev. 447, 109 Pac. 718, 721; Conde v. Sweeney, 16 Cal. App. 157, 116 Pac. 319, 320.

[79] Acting Commissioner Holcomb, Copp's Min. Lands, p. 300; Commissioner Burdett, 1 Copp's L. O. 179; Russell v. Wilson Creek Cons. M. Co., 30 L. D. 321; Yankee Lode, 30 L. D. 289.

[80] Yankee Lode, 30 L. D. 289.

[81] Rev. Stats., § 2322; 17 Stats. at Large, 91; Comp. Stats. 1901, p. 1425; 5 Fed. Stats. Ann. 13.

usually called placers, frequently exist in the same superficial area is a matter of common experience.

That when so found they may be held by the same or different persons is well settled by both judicial and departmental decisions.[82]

While it is undoubtedly true that a mining location, whether lode or placer, is property in the highest sense of the term, and when perfected is equivalent to a grant from the government,[83] yet it does not follow that the thing granted is the same in both classes of locations, nor that things reserved from the operation of one grant are likewise excepted from the operation of the other.

There is a marked distinction between the surface rights acquired by a lode location and those flowing from a placer location. In the former, there is a grant of the exclusive right of enjoyment of the surface and everything within vertical planes drawn downward through the surface boundaries, subject only to the extralateral right of outside apex proprietors to pursue their veins underneath such surface. No subsequent locator, either lode or placer, can invade such surface, though he may openly and peaceably enter for the purpose of laying his lines in such a manner as to properly define his extralateral right.[84] On the other hand, lodes found within the placer surface, or underneath it, if their existence is known prior to the application for placer patent, are not the subject of a placer

[82] Reynolds v. Iron S. M. Co., 116 U. S. 687, 695, 6 Sup. Ct. Rep. 601, 29 L. ed. 774, 15 Morr. Min. Rep. 591; Aurora Lode v. Bulger Hill Placer, 23 L. D. 95.

[83] Belk v. Meagher, 104 U. S. 279, 283, 26 L. ed. 735, 1 Morr. Min. Rep. 510; Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15 Morr. Min. Rep. 482; Mt. Rosa M. M. & L. Co. v. Palmer, 26 Colo. 56, 77 Am. St. Rep. 245, 56 Pac. 176, 177, 50 L. R. A. 289.

[84] *Ante*, §§ 363, 363a.

grant.[85] Therefore, the placer claimant may not own everything upon the surface or found within vertical planes drawn downward through the surface boundaries. The policy of the government with reference to lodes is to sever them from the body of the public lands, and to deal with them and the land immediately inclosing them as separate and distinct entities.[86]

The location of mining ground for placer purposes does not effect such severance. The placer claimant *may*, in the absence of a discovery and location by others, obtain the title to the lode, but he has not such right by virtue of his prior placer appropriation, unless the existence of the lode remains unknown until the application for a placer patent is filed.[87] It is no objection to the validity of a placer location that it embraces veins or lodes as well as placer deposits,[88] but the right to appropriate the lode must flow from the discovery of the *lode*. Whosoever first discovers the lode may appropriate it by complying with the laws conferring privileges upon such discoverers. If he fails to do so, it is open to the next comer; and this rule applies to the placer claimant as well as to strangers. If, having discovered it, he fails to manifest his intention to *claim* it by appropriating it under the lode laws, it may be the subject of appropriation by others, the same as if it

[85] Reynolds v. Iron S. M. Co., 116 U. S. 687, 693, 6 Sup. Ct. Rep. 601, 29 L. ed. 774, 15 Morr. Min. Rep. 591; Iron S. M. Co. v. Mike & Starr M. Co., 143 U. S. 394, 402, 12 Sup. Ct. Rep. 543, 36 L. ed. 201; Dahl v. Raunheim, 132 U. S. 260, 262, 10 Sup. Ct. Rep. 74, 33 L. ed. 324, 16 Morr. Min. Rep. 217; Clary v. Hazlitt, 67 Cal. 286, 7 Pac. 701, 702; Mt. Rosa M. M. & L. Co. v. Palmer, 26 Colo. 56, 77 Am. St. Rep. 245, 56 Pac. 176, 178, 50 L. R. A. 289; Washoe Copper Co. v. Junila, 43 Mont. 178, 115 Pac. 917, 1 Water & Min. Cas. 451.

[86] McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 592, 50 L. R. A. 184; Waterloo M. Co. v. Doe, 82 Fed. 45, 50.

[87] Aurora Lode v. Bulger Hill Placer, 23 L. D. 95.

[88] Hogan v. Idaho Placer M. Co., 34 L. D. 42.

were upon the public domain; *provided*, always, that such appropriation is made and perfected peaceably and in good faith.[89] In this respect, the same rules of law which govern the location of mineral land occupied or claimed by others under inchoate agricultural holdings are to be applied. We have fully discussed this subject in preceding articles. It is unnecessary to here repeat what is there said.[90]

There is no reason why a placer claimant may not locate a lode claim within his unpatented placer claim, or consent that others may do so.[91]

The issuance of a placer patent containing within its limits a lode known to exist prior to the patent application, which lode is not claimed and applied for by the placer claimant as a *lode*, does not cut off the right to appropriate it in hostility to the patentee. His failure to include it in his placer application is a conclusive declaration that he has no right to it.[92]

The courts seem to make a distinction between the right to enter openly and peaceably within the limits of a prior placer claim for the purpose of perfecting the

[89] McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 592, 50 L. R. A. 184; Mt. Rosa M. M. & L. Co. v. Palmer, 26 Colo. 56, 77 Am. St. Rep. 245, 56 Pac. 176, 178, 50 L. R. A. 289; Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 230, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

[90] *Ante*, §§ 206, 216, 219.

[91] McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 592, 50 L. R. A. 184; Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 230, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

[92] Rev. Stats., § 2333; 17 Stats. at Large, 94; Comp. Stats. 1901, p. 1433; 5 Fed. Stats. Ann. 45; Sullivan v. Iron S. M. Co., 143 U. S. 431, 434, 12 Sup. Ct. Rep. 555, 36 L. ed. 214; Reynolds v. Iron S. M. Co., 116 U. S. 687, 698, 6 Sup. Ct. Rep. 601, 29 L. ed. 774; Iron S. M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394, 402, 12 Sup. Ct. Rep. 543, 36 L. ed. 201; Iron S. M. Co. v. Reynolds, 124 U. S. 374, 381, 8 Sup. Ct. Rep. 598, 31 L. ed. 466; United States v. Iron S. M. Co., 128 U. S. 673, 680, 9 Sup. Ct. Rep. 195, 32 L. ed. 571; Noyes v. Mantle, 127 U. S. 348, 353, 8 Sup. Ct. Rep. 1132, 32 L. ed. 168, 15 Morr. Min. Rep. 611.

location of a previously discovered lode and the privilege of entering upon the placer surface for the purpose of prospecting or searching for undiscovered lodes. The supreme court of Colorado, while conceding that a stranger may so enter within the placer boundaries to locate a lode previously known to exist therein,[93] holds that he may not make such an entry for the purpose of searching for lodes whose existence may be suspected but not demonstrated.[94]

> One may not go upon a prior valid placer location to prospect for unknown lodes thereafter discovered and located in this manner and within the placer boundaries unless the placer owner has abandoned his claim, waives the trespass or by his conduct is estopped to complain of it.[95]

This is nothing more than the application of the general doctrine that a valid location once perfected gives the exclusive right of possession, and no one may enter thereon for the purpose of initiating an adverse location so long as the prior location remains valid and subsisting.[96]

In this respect the court follows the doctrine applied by the courts to locations made under the act of July 26, 1866, under which only one lode could be claimed. Before a stranger to the original location could enter for the purpose of locating a second lode, the fact that

93 See Noyes v. Clifford, 37 Mont. 138, 94 Pac. 842, 844; Kift v. Mason, 42 Mont. 232, 112 Pac. 392, 394.

94 Clipper M. Co. v. Eli M. Co., 29 Colo. 377, 93 Am. St. Rep. 89, 68 Pac. 289, 64 L. R. A. 209.

95 Clipper M. Co. v. Eli M. Co., 29 Colo. 377, 93 Am. St. Rep. 89, 68 Pac. 286, 289, 64 L. R. A. 209; quoted and approved on appeal, Clipper M. Co. v. Eli M. Co., 194 U. S. 220, 230, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

96 Moffatt v. Blue River Gold Extraction Co., 33 Colo. 142, 80 Pac. 139, 140.

two lodes existed within the boundaries was required to be first established.[97]

If a placer claimant has abandoned his claim, or waived the trespass, or by his conduct is estopped from complaining of it, the subsequent lode location will be considered valid.[98]

The principles discussed in previous sections,[99] concerning the right to enter upon prior claims for the purpose of laying lines or establishing monuments with a view to acquiring something not claimed by or embraced within the prior location, can be aptly applied to the case of lodes "known to exist" within placer claims.

While the land department at one time held that with the issuance of the placer patent its jurisdiction terminated, and thereafter it had no right to entertain a subsequent application for a patent to a lode claim within the patented placer limits,[100] it subsequently changed its ruling to conform to the legal results necessarily flowing from the exposition of the law by the supreme court of the United States.[1]

The same rule is now applied to known lodes within townsites.[2] A finding by a court in an adverse suit brought by a lode claimant against the placer appli-

97 Atkins v. Hendree, 1 Idaho, 95, 2 Morr. Min. Rep. 328.

98 Clipper M. Co. v. Eli M. Co., 29 Colo. 377, 93 Am. St. Rep. 89, 68 Pac. 286, 289, 64 L. R. A. 209; affirmed, 194 U. S. 220, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

99 §§ 363, 363a.

100 Rebel Lode, 12 L. D. 683; Pike's Peak Lode, 14 L. D. 47; South Star Lode, 17 L. D. 280.

1 South Star Lode, on review, 20 L. D. 204; Butte & Boston M. Co., 21 L. D. 125; Cripple Creek G. M. Co. v. Mt. Rosa M. M. & L. Co., 26 L. D. 622; Alice M. Co., 27 L. D. 661; Cape May M. & L. Co. v. Wallace, Id. 676; Ryan v. Granite Hill M. Co., 29 L. D. 522.

2 *Ante*, §§ 173, 177; Pacific Slope Lode v. Butte Townsite, 25 L. D. 518; Gregory Lode Claim, 26 L. D. 144.

cant, that there was no known lode, will be treated by the department as an adjudication of the matter.[3] The land department is reluctant to reopen the question of placer character of land at the instigation of a lode claimant where years have elapsed since entry for patent as a placer claim.[4]

It is not our purpose to here define what is meant by a "lode known to exist within the boundaries of a placer claim," as that phrase occurs in section twenty-three hundred and thirty-three of the Revised Statutes. This will be fully discussed when dealing with the subject of placer patents and the nature and extent of title conferred by placer locations.[5] We also exclude from the discussion controversies over the character of the land, that is, whether a given deposit is placer or lode, such a controversy as has arisen in the rock phosphate regions of the west discussed in a subsequent section.[6] We are now concerned simply with the manner of locating lodes within placers, the existence of both classes of deposits within the same area being confessedly known prior to the application for the placer patent.

We are justified in deducing from the foregoing the following conclusions:—

(1) A perfected placer location does not confer the right to the possession of veins, or lodes, which may be found to exist within the placer limits at any time prior to filing an application for a placer patent;

(2) Such lodes may be appropriated (*a*) by the placer claimant, or (*b*) by others, provided the appropriation is effected by peaceable methods and in good faith;

[3] Alice M. Co., 27 L. D. 661. *Post*, § 720.
[4] Meaderville M. & M. Co. v. Raunheim, 29 L. D. 465.
[5] *Post*, § 781.
[6] *Post*, § 425a.

(3) Where a lode is known to exist within the limits of a placer location at any time prior to the placer application for patent, and is not claimed in the application as a *lode*, the title to such lode does not pass by the patent, but it may be located by anyone having the requisite qualifications, provided the location is made peaceably and in good faith.[7]

It frequently happens that after the issuance of a placer or an agricultural patent a valuable lode is discovered within the patented limits. By reason of the nature of the grant, this lode cannot be followed on its downward course beyond the vertical bounding planes. Under such circumstances attempts have been made to surrender or reconvey to the government the title deraigned through the patent so as to render a lode location with the accessory extralateral right possible. These attempts, however, have not been successful, for the reason that the officers of the land department are not invested with authority by congress to receive titles to properties by reconveyance to the United States unless the original patent was issued through inadvertence or mistake, or was fraudulently or wrongfully obtained, and suit might be brought to vacate it.[8]

§ 414. Manner of locating lodes within placers.— With the exception of determining the quantity of surface which may be taken in conjunction with a lode found within a placer claim, a question to be presented in the next section, there is no difference between the manner of locating such a lode and any other found

[7] Mt. Rosa M. M. & L. Co. v. Palmer, 26 Colo. 56, 77 Am. St. Rep. 245, 56 Pac. 176, 50 L. R. A. 289; Noyes v. Clifford, 37 Mont. 138, 94 Pac. 842, 844; Kift v. Mason, 42 Mont. 232, 112 Pac. 392, 394; Washoe Copper Co. v. Junila, 43 Mont. 178, 115 Pac. 917, 918, 1 Water & Min. Cas. 451.

[8] San Francisco Mining Co., 29 L. D. 397; In re Tryon, 29 L. D. 475.

within the public domain. It must be discovered and developed, the location must be marked upon the surface, and all other formalities required by federal or state legislation must be complied with to the same extent as in case of lodes situated elsewhere. As the right necessarily flows from discovery, to perpetuate such right the subsequent acts resulting in a perfected location must be complied with.

As to the surface lines inclosing the lode, while the inclosed area may possibly be limited, yet their general direction with reference to the discovered vein must conform to the general rule governing lode locations.[9] In placer locations, except upon unsurveyed lands, and under certain specified conditions to be hereafter noted,[10] the boundaries must conform to the public surveys, without regard to the course or direction of veins which may be found therein. Such boundaries perform a different function from those required in the case of lode claims.

Whatever may be the dimensions of a placer location which, when participated in by an association of persons, may cover an area of one hundred and sixty acres,[11] a lode location within a placer cannot exceed the statutory limit as to length—that is, fifteen hundred feet. End-lines must be established within this limit, and, in order to acquire extralateral rights, should cross the located lode and be parallel to each other. A placer boundary may be coincident with a lode boundary if so claimed and marked. But the rights upon the discovered lode will be defined only by the lode

[9] Reynolds v. Iron S. M. Co., 116 U. S. 687, 694, 6 Sup. Ct. Rep. 601, 29 L. ed. 774, 15 Morr. Min. Rep. 591.

[10] See next chapter.

[11] Rev. Stats., § 2330; 16 Stats. at Large, 217; Comp. Stats. 1901, p. 1432; 5 Fed. Stats. Ann. 42.

boundaries, established and marked as such. In this respect, the statute makes no distinction between lodes within placers and other lodes. In considering this class of lode location, the only debatable question is the quantity of surface which the locator may appropriate for the purpose of inclosing his lode. In all other respects the general rules apply.

§ 415. Width of lode locations within placers.—As to the amount of surface which may be appropriated in connection with a lode discovered within a previously located placer claim, the statute seems to be somewhat ambiguous, and its proper construction has been a matter of serious embarrassment to the land department as well as to the courts.

The limit of the superficies of a lode location on the public domain under the federal law is fifteen hundred feet along the lode and three hundred feet on each side of the middle of the vein.

The section providing for the acquisition of title to lodes within a placer location is as follows:—

> Where the same person, association, or corporation is in possession of a placer claim and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim subject to the provisions of this chapter, including such vein or lode claim and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre,[12] together with

[12] For reasons making the price of the area within the lode claims five dollars per acre, and with placer claims two dollars and fifty cents per acre, see Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 228, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

all costs of proceedings; and where a vein or lode such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of a placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.[13]

The question presents itself in two aspects:—

(1) Where the lode is located and claimed by the placer claimant;

(2) Where it is located and claimed by strangers to the placer title.

As to the placer claimant, there is no logical or economic reason why he should not be permitted to select as much of the surface inclosing the lode as the law will permit in case of other lode locations; that is, within the limit of fifteen hundred by six hundred feet, in the absence of state laws or local regulations restricting the right to less. There is no requirement that land contiguous to the lode, and appropriated with it, should be nonmineral in character. As he owns the surface of the placer, except as against a lode locator, no one can complain if the placer claimant takes any quantity within the prescribed limit. His taking more than the twenty-five feet would simply operate as an abandonment *pro tanto* of the placer claim. But he is required to take at least twenty-five feet on each side of the center of the vein, and pay therefor at the rate

[13] Rev. Stats., § 2333; 17 Stats. at Large, 94; Comp. Stats. 1901, p. 1433; 5 Fed. Stats. Ann. 45.

of five dollars per acre. The remainder he may enter as placer ground at half that rate.

But let us assume a case of a lode discovered within a prior placer claim by a stranger to the placer title, such discovery antedating the application for a placer patent. That such lode may be located and claimed by the discoverer seems to be well settled. But the extent of surface to which such locator may be entitled, with due regard to the rights of the prior placer claimant, is the subject of debate. The question assumes this form: What is in contemplation of law reserved out of a placer location? or, To what extent is the surface of a prior placer location subject to invasion and diminution by a subsequent discoverer of a lode within the placer boundaries?

The question may be answered in one of four ways:—

(1) Either the lode locator is entitled to the full width allowed to other lode locations, or

(2) He is allowed twenty-five feet on each side of the lode, or

(3) He is allowed no surface, or

(4) He may take only such surface as may be reasonably necessary for the enjoyment of the lode.

The supreme court of the United States held, in Noyes v. Mantle,[14] that a placer patent reserves a lode claim, located prior to the application for patent, to its full extent; but in that case, although the decision as reported is silent as to the date of the placer location, it is quite manifest that the lode was discovered and located prior to the location of the placer.[15] Such prior location withdraws the area covered, and the subse-

[14] 127 U. S. 348, 354, 8 Sup. Ct. Rep. 1132, 32 L. ed. 168, 15 Morr. Min. Rep. 611.

[15] The record in this case, as filed, discloses the fact that the lode was located in April, and the placer the following October.

quent placer locator could, of course, obtain no rights as against the lode locator. This is not the case we have assumed. If, in the Noyes-Mantle case, the lode location in controversy had been the junior in date, we might infer from the decision that the subsequent lode locator was authorized to select, within the boundaries of the placer, a full surface claim. But as heretofore indicated, the lode location in that case antedated not only the application for placer patent, but the *location* of the placer.

When we examine the rulings of the land department, we find that they are not uniform.

Originally, that department held that the claimant of a lode within placer limits could only assert the right, as against a placer patentee, to twenty-five feet on each side of the center of the vein. If he sought to claim more, he could only protect his right to the increased area by adversing the placer applicant. Failing to do so, he was limited to a width of fifty feet.[16]

This was before the decision in Noyes v. Mantle (*supra*). Subsequent to this decision, the department reached the following conclusions, after quoting from the cases of Noyes v. Mantle and Reynolds v. Iron S. M. Co.:[17]—

> It thus appears that the limitation of the width of the claim in section twenty-three hundred and thirty-three, Revised Statutes, is only applicable where the same claimant seeks a patent for a vein, or lode, included within the boundaries of his placer claim, and has no application to a lode claim properly perfected by another, prior to the date of the application for patent for placer claim, whose boundaries include the

16 Shonbar Lode, 1 L. D. 551; Id., 3 L. D. 388.

17 116 U. S. 687, 698, 6 Sup. Ct. Rep. 601, 29 L. ed. 774, 15 Morr. Min. Rep. 591; second appeal, 124 U. S. 374, 8 Sup. Ct. Rep. 598, 31 L. ed. 466.

lode claim. If, therefore, it shall appear from the record that there is a lode claim within the boundaries of a placer claim, then that lode claim in its full extent should be excepted from the placer patent.[18]

But in this case the department declined to patent the lode claim at all, for the reason that its jurisdiction had been exhausted by the issuance of the placer patent—a ruling which, as heretofore noted,[19] was subsequently changed. A later expression of opinion by the land department upon the subject under consideration is found in a decision by Secretary Smith in the case of the Aurora Lode v. The Bulger Hill and Nuggett Gulch Placer.[20]

In this case, the placer claims were first located, the Bulger Hill on March 19th, and the Nuggett Gulch on April 6, 1881. The Aurora lode was located April 9th of the same year. The properties had been in litigation, arising out of patent proceedings, the Aurora lode claimant having applied for a patent, which was adversed by the placer claimant, the judgment being in favor of the latter.[21]

Notwithstanding this, the land department entertained the protest of the lode claimant against the issuance of a patent to the placer claimant, and after discussing the effect of the judgment of the court, and the relative rights of the two classes of claimants, the secretary of the interior thus expresses his views:—

The only question which presents any serious difficulty to my mind relates to the extent of surface area the lode claimant will be entitled to in the event he sustains, by proof in the regular way, the allegations

[18] Pike's Peak Lode, 10 L. D. 200, 203.

[19] § 413.

[20] 23 L. D. 95, 348.

[21] Bennett v. Harkrader, 158 U. S. 441, 15 Sup. Ct. Rep. 863, 39 L. ed. 1046.

of his protest. His claim as originally located appears to be something over five hundred feet in width at the points of conflict with the placer locations. The extensive and valuable improvements erected upon the claim are alleged to be upon that part within the overlap. The surface ground being, however, only an incident to the lode, and not a part of it, I am of the opinion, that under the judgment of the court, the placer claimant is entitled to the surface area within the overlap, except so much thereof as is necessary to the occupation, use, operation, and enjoyment of the lode claim by its owners. This may be more or less, according to the extent and location of the present improvement, if any, and other conditions peculiar to this particular claim. I know of no established precedent controlling in such a case as this, but in view of the superior right of the placer claimant to the surface area as established by prior location and by the judgment of the court in the adverse proceedings, I do not think that the superior right of the lode claimant to the possession of his lode, if its discovery, location, and known existence be true, as alleged, should be allowed to carry with it more surface ground within the overlap than is necessary for the occupation, use, operation, and full enjoyment thereof. Having been defeated in the adverse proceedings in the court, it would appear to be but just and right that the lode claimant should be thus restricted as touching the surface area of his claim, and, indeed, such seems to be necessary in order to give effect to the court's judgment.

Without stopping to consider the binding effect of the judgment in the adverse proceedings as an estoppel upon the lode claimant, we think that the ruling of the secretary proceeds upon considerations of an equitable nature, rather than upon anything deducible from the mining laws. If we assume that nothing is reserved out of the placer location but the lode itself, we practically concede that the reservation is of no substantial

benefit to anyone, as the right to enjoy it would be practically denied. The placer locator would hold everything, except the ledge bounded by its inclosing walls, and no right of entry over or through the placer ground would be permitted.[22] Or, at the utmost, the lode claimant would only be entitled to an *easement* over the placer ground, upon the principle that a reservation of a thing out of a grant is a reservation of whatever may be necessary to its enjoyment.

But the mining laws contemplate no such conditions. The only method by which the lode may be located is by defining a surface inclosing it.[23]

Since the department rendered its decision in the case of the Aurora Lode v. The Bulger Hill and Nuggett Gulch Placer (*supra*), the question has been referred to in several cases.[24]

In the case of the North Star lode,[25] Acting Secretary Ryan said:—

> The difficulties in reaching a correct solution of this question are such that the department believes it better to withhold a decision thereof until a case is reached wherein the opposing views and arguments are fully presented, so that the decision may be based upon full consideration thereof.

The last expression of opinion by the secretary will be noted after stating the conclusions reached by the courts.

So far as the decisions of the courts are concerned, we have noted but one reported case which analyzes the statute and announces a definite solution of the question. We refer to a decision participated in by a

22 Dower v. Richards, 73 Cal. 477, 480, 15 Pac. 105, 107.

23 *Ante*, §§ 71, 361.

24 Elda M. & M. Co. v. Mayflower G. M. Co., 26 L. D. 573; Cape May M. & L. Co. v. Wallace, 27 L. D. 676.

25 28 L. D. 41, 44.

majority of the supreme court of Colorado in the case of Mt. Rosa Mining and Milling and Land Co. v. Palmer.[26] We quote so much thereof as is necessary to show the conclusion reached and the reasoning on which it was based:—

> The question was also involved upon the trial of the case of Campbell v. Iron S. M. Co., in the circuit court of the United States, for this district, Judge Riner presiding. He entertained the view, and instructed the jury to the effect, that a lode claimant, in case of a recovery, was entitled to no more than the vein or lode, and fifty feet of ground, extending fifteen hundred feet in length. We think this instruction correctly defines the amount of surface ground to which a lode located within the boundaries of a placer is entitled, under the provisions of section twenty-three hundred and thirty-three. As was said in Reynolds v. Iron S. M. Co. (*supra*): "This section made provision for three distinct classes of cases: (1.) When the applicant for a placer patent is at the time in possession of a vein or lode included within the boundaries of his placer claim he shall state that fact, and, on payment of the sum required for a vein claim and twenty-five feet on each side of it, at five dollars per acre, and two dollars and fifty cents for the remainder of the placer claim, his patent shall cover both. (2.) It enacted that, where no such vein or lode is known to exist at the time the patent is applied for, the patent for a placer claim shall carry all valuable mineral and other deposits which may be found within the boundaries thereof. (3.) But, in case where the applicant for the placer is not in possession of such lode or vein within the boundaries of his claim, but such vein is *known to exist*, and it is not referred to or mentioned in the claim or patent, then the *application shall be construed as a conclusive declaration that the claimant of the placer mine has no right to the possession of*

[26] 26 Colo. 56, 77 Am. St. Rep. 245, 56 Pac. 176, 50 L. R. A. 289.

the vein or lode claim." We think it is manifest that the lode or vein referred to in the first and third provisions is the same thing, and that whatever a placer claimant would acquire by availing himself of the privilege accorded him by the first provision of the section, is reserved by virtue of the third provision; in other words, that the same extent of surface ground that is incident to such lode or vein, if located and patented by the placer claimant, is reserved from the placer patent in case of his failure to claim and patent the same. If he elects to patent the lode, he is required to take twenty-five feet on each side of the center of the vein, and pay therefor at the rate of five dollars per acre. This is a privilege accorded to him, which he may avail himself of, or not, as he sees fit. If he elects to waive this privilege, he may do so in one of two ways—either by expressly excepting the lode from his placer location and application for patent, or remaining silent in regard to it. If silent, then by implication he declares that he makes no claim to such lode and by such silence is bound to the same extent, and in the same manner, but no further, than he would have been by an express declaration. By electing to make no claim to a known lode, or express declaration in regard to it, he must be understood as claiming, for placer purposes, the greatest possible area within the boundaries of his placer claim and should be held to have relinquished only that which he might have taken, which is the lode, with the amount of surface ground provided. Why should there be any difference between the rights of claimants of known lodes within the boundaries of a placer? We know of none. The object of excepting known lodes from placer locations was to prevent titles to such lodes being obtained under the guise of a placer; at the same time, in order to protect claimants to each character of mineral locations to the greatest extent, and preserve to each that which was most valuable for particular purposes in connection with each class of

claims. The lode, for convenient working, could not be limited to less than twenty-five feet on each side of the center of the vein; and the placer, which would be valueless without such surface rights, is permitted to take title to the remaining area accordingly. Those who controvert this view base their contention upon the provisions of section twenty-three hundred and twenty, which it is said governs the length and width of all lode claims, whether made within the boundaries of a placer claim or not. An act on a particular subject must be construed as a whole. Section twenty-three hundred and twenty refers to the location of lodes not conflicting with any other class of mineral locations; while by section twenty-three hundred and thirty-three special conditions with reference to conflicts between the two classes of mineral claims are specially provided for; and, to that extent, construing the act as a whole, is a limitation or qualification of the provisions of section twenty-three hundred and twenty, which relates, as stated, to the width of lode claims generally, and regulates the width of lode claims when made upon lodes within the boundaries of a placer, whether such lodes are located by the owner of the placer or strangers to that title. By this construction full force and effect is given to both of these sections, and the purpose of the statute is carried out. The government receives for its mineral lands the price fixed for lodes and placers, respectively, and the superior right to the surface area of the placer claimant, acquired by his prior location or patent, is protected. It is the conclusion of a majority of the court that the limitation of the width of a lode claim in section twenty-three hundred and thirty-three is not only applicable to the placer claimant, but applies as well to others who locate a lode within the boundaries of his previously located placer. Chief Justice Campbell declines to express an opinion upon this question, because, in his judgment, the stipulation entered into by counsel eliminates it from the case. It

follows that the court below erred in adjudging to appellee surface ground in excess of twenty-five feet on each side of the lodes in question. For this reason, the judgment is reversed, and the case remanded, with directions to enter judgment in accordance with the views we have expressed.[27]

This principle is recognized by the supreme court of Montana.[28] In the case of Clipper M. Co. v. Eli M. & L. Co.[29] the supreme court of the United States says somewhat guardedly that the lode claimants would be entitled to *at least* twenty-five feet on each side of the middle of the vein.

The views thus entertained by the supreme court of Colorado have recently received the approval of the secretary of the interior in a communication addressed by him to the attorney-general.[30] This communication requested that proceedings be instituted in behalf of the United States to cancel a patent issued for a lode claim within a prior located placer, upon the ground, among others, that a surface covering a width of three hundred feet had been patented, whereas the surface width should have been limited to twenty-five feet on each side of the center of the vein. The secretary calls the attorney-general's attention to the views of the department as previously expressed in the cases heretofore commented on, and then gives his unqualified sanction to the doctrine announced by the supreme court of Colorado, in the following language:—

This decision, coming from the court of last resort of one of the principal mining states, is entitled to grave weight, and upon careful consideration of the

[27] Mt. Rosa M. M. & L. Co. v. Palmer, 26 Colo. 56, 63, 77 Am. St. Rep. 245, 56 Pac. 176, 178, 50 L. R. A. 289.

[28] Noyes v. Clifford, 37 Mont. 138, 94 Pac. 842, 848.

[29] 194 U. S. 220, 231, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

[30] April 1, 1902, not reported.

reasons assigned for the conclusions reached, the department is of the opinion that the interpretation given the statute in said decision is correct.

This opinion was referred to and followed by the secretary of the interior in the case of Daphne Lode Claim.[31]

With this consensus of opinion of the courts and the land department the rule may be considered as practically settled.

31 32 L. D. 513, in which the secretary comments on the author's views as expressed in the second edition.

CHAPTER III.

PLACERS AND OTHER FORMS OF DEPOSIT NOT "IN PLACE."

ARTICLE I. CHARACTER OF DEPOSITS SUBJECT TO APPROPRIATION UNDER LAWS APPLICABLE TO PLACERS.

II. THE LOCATION AND ITS REQUIREMENTS.

III. THE DISCOVERY.

IV. STATE LEGISLATION AS TO POSTING NOTICES AND PRELIMINARY DEVELOPMENT WORK.

V. THE SURFACE COVERED BY THE LOCATION—ITS FORM AND EXTENT.

VI. THE MARKING OF THE LOCATION ON THE GROUND.

VII. THE LOCATION CERTIFICATE AND ITS RECORD.

VIII. CONCLUSION.

ARTICLE I. CHARACTER OF DEPOSITS SUBJECT TO APPROPRIATION UNDER LAWS APPLICABLE TO PLACERS.

§ 419. The general rule.

§ 419a. Conservation measures and withdrawal orders as affecting placer locations.

§ 420. Specific substances classified as subject to entry under the placer laws.

§ 421. Building-stone and stone of special commercial value.

§ 422. Petroleum.

§ 423. Natural gas.

§ 424. Brick clay.

§ 425. Phosphatic deposits.

§ 425a. Manner of locating phosphate deposits.

§ 425b. Potash.

§ 426. Tailings.

§ 427. Subterranean gravel deposits in ancient riverbeds.

§ 428. Beds of streams.

§ 429. Lands under tide waters.

§ 419. The general rule.—In a preceding chapter,[1] in determining what constitutes "mineral land," which as such is susceptible of appropriation under the mining laws, we have to some extent anticipated much that might be properly said in defining the character of de-

[1] *Ante*, §§ 85–98.

posits which are subject to appropriation under the laws applicable to placers, and we have there endeavored[2] to formulate general rules by which the mineral character of substances is to be established. In conformity with these rules, land of the public domain may be entered under the laws applicable to placers when it is shown to have upon or within it such a substance as falls within the classification named in section ninety-eight, if such substance is found in the form of superficial or other deposits not *in place*. If a discovered deposit satisfies the law as to its mineral character, and it is not found in veins of quartz, or other rock in place, it may be appropriated under the laws applicable to placers. It is the mode of occurrence, whether in place or not in place, which determines the manner in which it should be located.[3] What constitutes "rock in place" has been fully discussed.[4]

We say that all forms of deposit, other than those occurring in veins of rock in place, must be appropriated under the laws applicable to *placers*, for the reason that *placers* present, in popular estimation, the highest type of deposits which do not occur in veins of rock in place, and are the only class of such deposits as are individualized and specially named in the statute.[5]

The right to acquire title to "claims usually called placers" was granted for the first time by the mining act of July 9, 1870.[6]

[2] *Ante*, § 98.

[3] Webb v. American Asphaltum M. Co., 157 Fed. 203, 205, 84 C. C. A. 651; Utah Onyx Development Co., 38 L. D. 504.

[4] *Ante*, §§ 299–301.

[5] Rev. Stats., § 2329; Comp. Stats. 1901, p. 1432; 5 Fed. Stats. Ann. 42.

[6] 16 Stats. at Large, p. 217; Comp. Stats. 1901, p. 1432; 5 Fed. Stats. Ann. 42.

This has always been familiarly called the "placer law," in contradiction to the "lode law" of July 26, 1866. The subsequent legislation preserved the distinction, so that, colloquially speaking, mineral deposits are to be treated either as lodes or placers. In time, *placer*, which was the name given by the Spaniards to the auriferous gravels of America,[7] has become a generic term, in which all forms of deposit, other than those occurring in veins, are popularly included.

Dr. Raymond, in his "Glossary of Mining and Metallurgical Terms,"[8] defines the word *placer* as a deposit of valuable mineral found in particles in *alluvium*, or *diluvium*, or beds of streams, and enumerates gold, tin ore, chromic iron, iron ore, and precious stones, as being found in placers. He adds to the definition the statement that, by the United States statutes, all deposits not classed as veins of rock in place are considered *placers*.

As was said by the supreme court of the United States, in distinguishing the two classes of deposits:—

> Placer mines, though said by the statute to include all other deposits of mineral matter, are those in which this mineral is generally found in the softer material which covers the earth's surface, and not among the rocks beneath.[9]

Assuming that our definition of "mineral," outlined in a previous chapter,[10] is based upon a correct interpretation of the law, there should be but little difficulty in determining whether land containing a given substance not in place is subject to entry under the placer

[7] Moxon v. Wilkinson, 2 Mont. 421, 12 Morr. Min. Rep. 602.

[8] Trans. Am. Inst. M. E., vol. ix, p. 164.

[9] Reynolds v. Iron S. M. Co., 116 U. S. 687, 695, 6 Sup. Ct. Rep. 601, 29 L. ed. 774, 15 Morr. Min. Rep. 591.

[10] *Ante*, §§ 85–98.

laws or not. The element of commercial value, its susceptibility of being extracted and marketed at a profit, and not its metallic or chemical character,[11] are the controlling factors in determining the question.[12]

This is clearly shown, not only by the evolution of denotation, illustrated in the history of English jurisprudence and the decisions of the American courts, but by a long line of departmental rulings, uniform, except as to certain specific substances. As was said by the supreme court of the United States:—

> The construction given to a statute by those charged with the duty of executing it, is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.[13]

While this element of profit, or commercial value, has generally pervaded the rulings of the land department,

11 *Ante*, § 323.

12 Pacific Coast Marble Co. v. N. P. R. R. Co., 25 L. D. 233; Aldritt v. Northern Pac. R. R. Co., 25 L. D. 349; Phifer v. Heaton, 27 L. D. 57; McQuiddy v. State of California, 29 L. D. 181.

13 *Post*, § 666; United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588; Hastings & Dakota R. R. v. Whitney, 132 U. S. 357, 366, 10 Sup. Ct. Rep. 112, 33 L. ed. 363; Hahn v. United States, 107 U. S. 402, 406, 2 Sup. Ct. Rep. 494, 27 L. ed. 527; Brown v. United States, 113 U. S. 568, 571, 5 Sup. Ct. Rep. 648, 28 L. ed. 1079; Doe v. Waterloo M. Co., 70 Fed. 455, 463, 17 C. C. A. 190, 82 Fed. 45, 50, 27 C. C. A. 50, 19 Morr. Min. Rep. 1; Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 59 Pac. 607, 616, 50 L. R. A. 209; McFadden v. Mountain View M. & M. Co., 97 Fed. 670, 677, 38 C. C. A. 354; Hawley v. Diller, 178 U. S. 476, 488, 20 Sup. Ct. Rep. 986, 44 L. ed. 1157; Hewitt v. Schultz, 180 U. S. 139, 157, 21 Sup. Ct. Rep. 309, 45 L. ed. 463; United States v. Southern Pac. R. R., 184 U. S. 49, 60, 22 Sup. Ct. Rep. 285, 46 L. ed. 425; Fairbank v. United States, 181 U. S. 283, 308, 21 Sup. Ct. Rep. 648, 45 L. ed. 862; McMichael v. Murphy, 197 U. S. 304, 312, 25 Sup. Ct. Rep. 460, 49 L. ed. 766.

This rule is said not to be an arbitrary one and is only to be invoked when the language of the statute is ambiguous and susceptible of two constructions or two reasonable interpretations. Houghton v. Payne, 194 U. S. 88, 100, 24 Sup. Ct. Rep. 490, 48 L. ed. 888. See, also, Hemmer v. United States, 204 Fed. 898, 904, 905.

we find that in dealing with certain specific substances, either by reason of their commonplace character, or the other extreme, their unique and peculiar properties, the department has lost sight of this controlling factor, and leaned toward strict and frequently, we think, strained rules of construction. Owing to the infinite variety in nature, the application to individual instances of general laws framed and construed on broad theories may seem to produce absurd results. But this in no sense proves that the law or the general rule of construction is absurd. We cannot conceive of any class of deposits of the general character under consideration which may not fairly be tested by the general rules announced in section ninety-eight.

That the true position of the land department upon this subject may be fairly presented, it is necessary to consider its rulings as to specific substances.

§ 419a. Conservation measures and withdrawal orders as affecting placer locations.—We have heretofore discussed the proposed national conservation measures,[14] the executive withdrawals of lands supposed to contain petroleum, natural gas, phosphates and coal, in the absence of express legislation of congress,[15] and the subsequent acts authorizing withdrawals for classification and other purposes, and have noted that the withdrawal areas are now closed to the miner and prospector in search of the nonmetalliferous minerals, so long as the withdrawals are in force.[16] The original act authorizing these withdrawals[17] permitted exploration, discovery, occupation, and pur-

[14] *Ante*, § 200.

[15] *Ante*, §§ 200a, 200b.

[16] *Ante*, § 200c.

[17] June 25, 1910, 36 Stats. at Large, p. 847; Comp. Stats. (Supp. 1911), p. 593; 1 Fed. Stats. Ann. (Supp. 1912), p. 321.

chase of lands containing mineral other than coal, oil, natural gas and phosphates found within the withdrawn areas. Subsequently, through the investigations of the geological survey, it was thought probable that deposits of potash and nitrates existed in commercial quantities on the public domain. These two commodities not being enumerated in the act, the president by special message to congress March 26, 1912, urged the immediate passage of an amendatory law which would exclude lands containing those substances which might be withdrawn, from exploration and location for mining and all other purposes. Congress responded by passing the act of August 24, 1912,[18] limiting the rights of exploration, discovery, occupation and purchase under the mining and other laws to lands in the withdrawn areas containing *metalliferous* mineral. It is, therefore, probable that the activities of the miner in search of the nonmetallic economic minerals will be confined to localities which have, for the time being, escaped the vigilance of the geological survey. An important discovery of any of the substances above enumerated in a new field would undoubtedly result in an immediate withdrawal of the unlocated remainder for purposes of classification, and to abide the subsequent action of congress as to their disposal. As all of these minerals, with the possible exception of rock phosphates, can only be located under the placer laws, it is advisable in discussing the substances which are subject to location under the placer laws to invite attention to the fact that lands containing them may only be appropriated under the mining laws when found outside of withdrawn areas; in other words, such lands temporarily withdrawn are not "public lands." They remain in a state of reservation until freed by

[18] 37 Stats. at Large.

proclamation of the president or by an act of congress. The extent to which this power of withdrawal has been and is being exercised justifies this comment.

§ 420. Specific substances classified as subject to entry under the placer laws.—Among the substances, other than those of a metallic character, which have been classified as mineral, and when occurring in the form of deposits not in place, lands containing which have been held to be subject to appropriation under the placer laws, we note the following:—

Alum;[19] asphaltum;[20] borax;[21] diamonds;[22] guano;[23] gypsum;[24] kaolin, or china clay;[25] marble;[26] mica;[27] onyx;[28] soda, carbonate and nitrate;[29] slate, for roofing purposes;[30] umber;[31] building-stone.[32]

19 Copp's Min. Lands, 50; 2 L. D. 707.

20 Copp's Min. Lands, 50.

21 Id. 50, 100; 2 L. D. 707; Copp's Min. Dec. 194; 1 Copp's L. O. 11.

22 Copp's Min. Lands, 88. See Kentucky M. & D. Co. v. Kentucky T. D. Co., 141 Ky. 97, 132 S. W. 397, 398, Ann. Cas. 1912C, 397.

23 Richter v. Utah, 27 L. D. 95.

24 Id. 309; Phifer v. Heaton, 27 L. D. 57; McQuiddy v. State of California, 29 L. D. 181. See Nephi Plaster Co. v. Juab County, 33 Utah, 114, 93 Pac. 53, 14 L. R. A., N. S., 1043.

25 Copp's Min. Lands, 121, 176, 209; 1 L. D. 565; Montague v. Dobbs, 9 Copp's L. O. 165; Aldritt v. Northern Pac. R. R. Co., 25 L. D. 349.

26 Copp's Min. Lands, 176; Pacific Coast Marble Co. v. N. P. R. R. Co., 25 L. D. 233; Schrimpf v. Northern Pac. R. R. Co., 29 L. D. 327; Henderson v. Fulton, 35 L. D. 652.

27 Copp's Min. Lands, 182.

28 Utah Onyx Dev. Co., 38 L. D. 504.

29 Id. 50; 2 L. D. 707.

30 Copp's Min. Lands, 143; 1 Copp's L. O. 132.

31 Copp's Min. Lands, 161.

32 Forsythe v. Weingart, 27 L. D. 680.

For enumeration of nonmetallic substances which fall within the purview of the mining laws, see Webb v. American Asphaltum Co., 157 Fed. 203, 205, 84 C. C. A. 651. See, also, Holman v. State of Utah, 41 L. D. 314, which holds that deposits of ordinary clay and limestone do not render land mineral in character, though there may be deposits of clay

As to these substances, we understand the rule is uniform, the elements of quantity and quality being present, by which the value of the land, for the purpose of removing and marketing the product, is determined. Other substances require specific mention.

§ 421. Building-stone, and stone of special commercial value.—As heretofore observed,[33] congress, on August 4, 1892, enacted a law, wherein it provided that any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building-stone under the provisions of the law in relation to placer mineral claims.[34] The previous rulings by the land department, as to whether land containing stone of this character was subject to entry under the placer laws, were not uniform.

In the case of Bennett,[35] Commissioner McFarland expressed the opinion that lands of such character were subject to such entry.

Some years later, Assistant Secretary Chandler declined to accept the views of the commissioner, and established the contrary doctrine.[36] The following year, the same assistant secretary "explained" and "distinguished" his previous ruling, and practically adopted the views of Commissioner McFarland in a case involving the interpretation of the law as it existed prior to the passage of the act of August 4, 1892.[37]

Secretary Noble held that this class of land was not "mineral land" so as to preclude its entry under the

and limestone of such exceptional nature as to warrant entry under the mining laws.

[33] *Ante*, § 139.

[34] 27 Stats. at Large, p. 348; Comp. Stats. 1901, p. 1434; 5 Fed. Stats. Ann. 47.

[35] 1884, 3 L. D. 116.

[36] Conlin v. Kelly (1891), 12 L. D. 1.

[37] McGlenn v. Wienbroeer, 15 L. D. 370.

agricultural land laws, although the proof showed that the tract in question was more valuable for the building-stone it contained than for agricultural purposes, following the first ruling of Assistant Secretary Chandler.[38]

A few months later Secretary Smith held that under the law as it existed prior to the passage of the act of August 4, 1892, land containing a deposit of sandstone of a superior quality for building and ornamental purposes, and valuable only as a stone quarry, might be entered as a placer claim under the general mining laws,[39] which ruling was practically ignored by Assistant Secretary Sims in a later case.[40]

Secretary Bliss originally expressed the opinion that prior to 1892 lands chiefly valuable for building-stone could not be purchased under the placer laws;[41] but on review of the same case he vacated his first decision and reached an opposite conclusion.[42] The land department has finally settled the rule that building-stone is a mineral.[43]

The passage of the act of congress referred to, occurring as it did subsequent to Assistant Secretary Chandler's first ruling, was a legislative affirmance of the theory of interpretation applied to other classes of nonmetallic substances, and a recognition of the rule which has for its foundation the element of commercial value.

38 Clark v. Ervin (Feb. 1893), 16 L. D. 122.

39 Van Doren v. Plested, 16 L. D. 508.

40 In re Delaney, 17 L. D. 120. See, also, In re Randolph, 23 L. D. 329.

41 Hayden v. Jamison, 24 L. D. 403.

42 Hayden v. Jamison, 26 L. D. 373.

43 Pacific Coast Marble Co. v. N. P. R. R. Co., 25 L. D. 233; Hayden v. Jamison, on review, 26 L. D. 373; Forsythe v. Weingart, 27 L. D. 680; Schrimpf v. N. P. R. R. Co., 29 L. D. 327; Henderson v. Fulton, 35 L. D. 652.

More than once congress has intervened when the department has undertaken to disregard this element, by applying arbitrary rules to individual cases.[44] A notable instance will be found when we reach the subject of petroleum.

The supreme court of Montana followed the ruling of Commissioner McFarland in the Bennett case.[45] The supreme court of Washington at one time declined to accept the reasoning of the supreme court of Montana, and held that the term "mineral" was intended to embrace only deposits of *ore*, and the idea of a nonmineralized deposit was excluded.[46] Subsequently, however, it reversed itself.[47]

As the law now stands, lands containing deposits of building-stone in such quantities as to render them more valuable for quarrying purposes than any other may be entered as placers under the mining laws,[48] or purchased under the stone and timber act of June 3, 1878.[49]

Lands containing limestone used for fluxing in metallurgical operations, or for the purpose of manufacturing the lime of commerce, have been held to be subject to entry under the placer laws.[50] Sandstone is held

[44] Webb v. American Asphaltum Co., 157 Fed. 203, 207, 84 C. C. A. 651; Union Oil Co., on review, 25 L. D. 351.

[45] Freezer v. Sweeney, 8 Mont. 508, 21 Pac. 20, 21.

[46] Wheeler v. Smith, 5 Wash. 704, 32 Pac. 784, 786.

[47] State v. Evans, 46 Wash. 219, 89 Pac. 565, 10 L. R. A., N. S., 1163.

[48] Webb v. American Asphaltum Co., 157 Fed. 203, 205, 84 C. C. A. 651.

[49] 20 Stats. at Large, p. 89; Comp. Stats. 1901, p. 1545; 7 Fed. Stats. Ann. 300; Forsythe v. Weingart, 27 L. D. 680. *Ante*, § 210.

[50] Commissioner Burdett (1875), Copp's Min. Lands, 176; Maxwell v. Brierly (1883), 10 Copp's L. O. 50; Shepherd v. Bird (1893), 17 L. D. 82; Morrill v. Northern Pac. R. R. Co., 30 L. D. 475; Johnston v. Harrington, 5 Wash. 93, 31 Pac. 316, 317.

to be a mineral,[51] as well as slate, marble,[52] and granite.[53]

Deposits of this character, although essentially in place, are locatable under the placer laws if they do not contain other mineral or valuable deposits. They are considered the "rock in place," but not a "vein or lode of quartz or other rock in place bearing gold . . . . or other valuable deposits."[54]

§ 422. **Petroleum.**—Petroleum has always been recognized as a mineral.[55] As was said by the supreme court of Pennsylvania: "It is a mineral substance obtained from the earth by the process of mining, and lands from which it is obtained may, with propriety, be called mining lands";[56] although that court had previously held that while admitting petroleum to be mineral, it was not included in a reservation of "mineral" in a deed.[57] Whatever may be the origin of petro-

[51] Beaudette v. N. P. R. R. Co., 29 L. D. 248.

[52] Schrimpf v. N. P. R. R. Co., 29 L. D. 327; Pacific Coast Marble Co. v. N. P. R. R. Co., 25 L. D. 233; Beaudette v. N. P. R. R. Co., 29 L. D. 327; Phelps v. Church of Our Lady, 115 Fed. 883, 53 C. C. A. 407; Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495, 49 Am. St. Rep. 683, 42 N. E. 186, 189; Brady v. Brady, 31 Misc. Rep. 411, 65 N. Y. Supp. 621.

[53] Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495, 49 Am. St. Rep. 683, 42 N. E. 186, 189; Northern Pac. R. R. Co. v. Soderberg, 99 Fed. 506, 508; S. C., on appeal, 104 Fed. 425, 43 C. C. A. 620.

[54] Henderson v. Fulton, 35 L. D. 652; In re Roy McDonald, 40 L. D. 7.

[55] *Ante*, § 93.

[56] Gill v. Weston, 110 Pa. 316, 1 Atl. 921. See, also, Stoughton's Appeal, 88 Pa. 198; Thompson v. Noble, 3 Pittsb. 201; Murray v. Allred, 100 Tenn. 100, 66 Am. St. Rep. 740, 43 S. W. 355, 358, 39 L. R. A. 249; Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436, 441, 25 L. R. A. 222.

[57] Dunham v. Kirkpatrick, 101 Pa. 36, 47 Am. Rep. 696. See, also, Detlor v. Holland, 57 Ohio St. 492, 49 N. E. 690, 692, 40 L. R. A. 266. The case of Dunham v. Kirkpatrick, *supra*, is held by the supreme court of Michigan to be against the weight of authority. Weaver v. Richards

leum, a still controverted question, it is well settled that it is a mineral.[58] Lands being developed for oil under the United States mining laws are "mining claims."[59]

Judge Ross, sitting as circuit judge in the ninth circuit, held that public land containing petroleum could only be acquired pursuant to the provisions of the mining laws relating to placer claims.[60] It would seem that this view was entertained by the land department,[61] until Secretary Hoke Smith, in August, 1896, ruled that petroleum lands were not mineral lands, could not be entered under the mining laws,[62] and might be selected by the states in lieu of lost sixteenth and thirty-sixth sections.[63]

Congress promptly intervened, as it had on a previous occasion in reference to building-stone,[64] and by act approved February 11, 1897, ordained:—

> That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum, or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral

(Mich.), 120 N. W. 818, 819. It is followed by the supreme court of Kentucky. McKinney's Heirs v. Central Kentucky N. G. Co., 134 Ky. 239, 20 Ann. Cas. 934, 120 S. W. 314, 315. And the principle is adopted by the supreme court of Louisiana. J. M. Guffey Petroleum Co. v. Murrel, 127 La. 466, 53 South. 705, 712.

58 Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 75 Pac. 995, 997, 1 Ann. Cas. 403.

59 Berentz v. Belmont Oil Co., 148 Cal. 577, 113 Am. St. Rep. 308, 84 Pac. 47, 48.

60 Gird v. California Oil Co., 60 Fed. 531, 532. See, also, Olive L. and D. Co. v. Olmstead, 103 Fed. 568, 572.

61 In re A. A. Dewey, 9 Copp's L. O. 51; Downey v. Rogers, 2 L. D. 707; In re Samuel Rogers, 4 L. D. 284; Roberts v. Jepson, 4 L. D. 60; Piru Oil Co., 16 L. D. 117.

62 Ex parte Union Oil Co., 23 L. D. 222.

63 Chandler v. State of California, Oct. 27, 1896.

64 *Ante*, § 421.

claims: *Provided*, that lands containing such petroleum, or other mineral oils, which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.

The land department subsequently overruled the decision of Secretary Smith.[65]

This, of course, settles the question for the future. We think the act of congress was but a legislative recognition of the law as it previously existed. As was said by Secretary Bliss,—

> This legislative action so promptly taken after the departure from the earlier rulings and the long established practice thereunder is significant and can hardly be considered as less than a disapproval by congress of the changed ruling.[66]

§ 423. Natural gas.—Natural gas is as much an article of commerce as iron ore, oil, coal, petroleum, or any other of the like products of the earth.[67]

> It is true [said the supreme court of Pennsylvania] that gas is a mineral, but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than the mere decision.[68]

[65] Union Oil Co., on review, 25 L. D. 351; McQuiddy v. State of California, 29 L. D. 181; Southern Pac. R. R. Co., 41 L. D. 264.

[66] Union Oil Co., on review, 25 L. D. 351. To the same effect is Webb v. American Asphaltum Co., 157 Fed. 203, 207, 84 C. C. A. 651.

[67] State v. Indiana & Ohio O. G. & M. Co., 120 Ind. 575, 6 L. R. A. 579, 22 N. E. 778; 2 Interstate Com. Rep. 758. See interesting note in 25 L. R. A. 222.

[68] Westmoreland & Cambria Nat. Gas Co. v. De Witt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731 (cited in Murray v. Allred, 100 Tenn. 100, 66 Am. St. Rep. 740, 39 L. R. A. 249, 43 S. W. 355, 359).

Although its origin is a matter of controversy, it is well settled that it is a mineral.[69]

It was held by the court of appeals of Ontario that natural gas is a mineral within the meaning of a statute which gives corporations power to sell or lease mineral rights under highways;[70] and the supreme court of the United States has decided that this commodity, when brought into this country from Canada through pipes, was exempt from duty as "crude mineral."[71]

While, owing to its "fugitive and wandering existence within the limits of a particular tract,"[72] the appropriation of it under the mining laws applicable to placers suggests an apparent absurdity, yet, as it is a mineral, is an article of commerce, and of great utility in an economic sense, we do not see why lands shown to contain it in quantities sufficient to make them more valuable for that purpose than any other should not be entered under the placer laws. The difference between asphaltum, mineral tar, petroleum, and natural gas, is only one of degree.[73]

[69] Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 1 Ann. Cas. 403, 75 Pac. 995; Mound City B. & G. Co. v. Goodspeed G. & O. Co., 83 Kan. 136, 109 Pac. 1002, 1 Water & Min. Cas. 244. See, also, Isone v. Rex Crude Oil Co., 147 Cal. 659, 82 Pac. 317, 318; People v. Bell, 237 Ill. 332, 15 Ann. Cas. 571, 86 N. E. 593, 594, 19 L. R. A., N. S., 746, and cases cited; Osborne v. Arkansas T. & O. Co. (Ark.), 146 S. W. 122, 124.

[70] Ontario Nat. Gas Co. v. Gosfield, 18 Ont. App. 626.

[71] United States v. Buffalo Nat. Gas Fuel Co., 172 U. S. 339, 342, 19 Sup. Ct. Rep. 200, 43 L. ed. 469, affirming 78 Fed. 110, 24 C. C. A. 4, 45 U. S. App. 345, and 73 Fed. 191. See, also, vol. 62 Eng. & Min. Journal, p. 602.

[72] Brown v. Vandergrift, 80 Pa. 147. See, also, Murray v. Allred, 100 Tenn. 100, 66 Am. St. Rep. 740, 43 S. W. 355, 359, 39 L. R. A. 249.

[73] As to the ownership of natural gas and the right of the state to prevent its exportation beyond the state, see Kansas Natural Gas Co. v. Haskell, 172 Fed. 545, 562; Haskell v. Kansas Natural Gas Co., 224 U. S. 217, 32 Sup. Ct. Rep. 442, 56 L. ed. 738; West v. Kansas Natural Gas Co., 221 U. S. 229, 31 Sup. Ct. Rep. 564, 55 L. ed. 716, 35 L. R. A., N. S., 1193. As to title to natural gas the Indiana rule is assumed

§ 424. **Brick and other classes of clay.**—Kaolin, or china clay, is classified as hydrous aluminum silicate, is extensively used in the ceramic art and is the aristocratic head of the clay family. It is classified as a mineral by the land department, and lands containing it are subject to location under the placer laws. Lands containing deposits of ordinary clay used in the manufacture of brick are not so considered. Common clay is classified metallurgically the same as kaolin, but its use is of such a commonplace character, and its distribution is so diffused over the earth, that it has been denied entrance into the category of minerals by the land department. Secretary Vilas held that, although a given tract was undoubtedly more valuable as a "clay placer" than for any other purpose, it was not mineral land, and could not be appropriated under the mining laws.[74]

The manufactured product from a bed of brick clay is more commonplace than the porcelain obtained from kaolin, or china clay, but we cannot understand why this should make any difference. The element of value in both cases rests upon the marketability of the manufactured product. Under the English decisions, brick clay is classified as a mineral under "the railway clauses act,"[75] and we can conceive of no logical reason why, in the administration of the federal mining laws, any discrimination should be made as between the finer and coarser grades of a substance, if it can be extracted, removed, and marketed at a profit.

The last expressions of the land department, however, are opposed to the classification of deposits of

to be different from the general rule. See Kansas Natural Gas Co. v. Haskell, *supra*.

[74] Dunluce Placer Mine, 6 L. D. 761. See, also, Jordan v. Idaho Aluminum M. & M. Co., 20 L. D. 500.

[75] *Ante*, § 92, p. 100.

ordinary brick clay as "mineral" within the meaning of the laws applicable to placer locations. Lands containing this substance fall within the definition of agricultural lands.[76]

We deferentially suggest that while it is true that this last analysis is in accordance with previous departmental rulings as to brick clay, the result reached is not altogether consistent with the principle repeatedly announced by the department with reference to numerous other nonmetallic substances,—that marketability at a profit is the test of the mineral character of a given tract of public land.

The courts, so far as they have spoken, disagree with the views of the land department on principle.[77] A similar disagreement exists between the courts and land department as to sand and gravel.[78] Just how the department would classify fireclay used for making the pottery of commerce remains to be determined. Probably it would fall into the same category as kaolin.

It is not difficult to account for this divergence of opinion. The courts follow a consistent uniformly recognized principle which establishes the test of profitable marketability. The land department follows this principle as a general rule, but disregards it in the case of the commonplace substances such as ordinary clay, sand and gravel. We submit deferentially that the commonplace quality of a substance is not a sufficient warrant for departing from the general rule. However, as the land department is the only tri-

[76] King v. Bradford, 31 L. D. 108; Holman v. State of Utah, 41 L. D. 314. The latter case intimates that there may be deposits of clay of such exceptional nature as to warrant entry under the mining laws.

[77] State v. Evans, 46 Wash. 219, 89 Pac. 565, 567, 10 L. R. A., N. S., 1163.

[78] Loney v. Scott, 57 Or. 378, 112 Pac. 172, 174; Zimmerman v. Brunson, 39 L. D. 310.

bunal which has the power to determine the character of land, it has the undoubted privilege of making exceptions to general rules, and the courts cannot interfere with the exercise of this prerogative.[79]

§ 425. Phosphatic deposits.—Until a comparatively recent date, the only public land state in the Union where the phosphatic deposits were known to occur in appreciable quantities was Florida. Deposits of this character have been extensively mined in South Carolina since 1868, but their existence in Florida was not known until 1887, since which time they have come into prominence, and have assumed considerable economic importance. They are, in general, most abundant in ancient river bottoms, where they have been washed together from their original beds.[80] Since 1890 mining of these deposits has been conducted upon a large scale, the shipments constituting a heavy item in the freights of the several railroads of the state. The raw material is consumed in large quantities in the United States, and it is exported to the various parts of Europe.[81]

Secretary Smith held that land chiefly valuable for phosphatic deposits of this character is mineral in character,[82] although, under a special act of congress, a homestead claimant who had initiated a right in ignorance of the existence of such deposits within the tract might perfect his entry, notwithstanding their discovery prior to the final entry,[83] thus changing the rule

[79] *Ante*, § 108.

[80] Dana's "System of Mineralogy," 6th ed., p. 769.

[81] "Preliminary Sketch of the Phosphates of Florida," by George H. Eldridge—Trans. Am. Inst., M. E., vol. xxi, p. 196.

[82] Gary v. Todd, 18 L. D. 58.

[83] Id., on review, 19 L. D. 475.

governing ordinary mineral lands within inchoate homestead claims, announced in a previous section.[84]

The same secretary also held that under the acts granting land to the Florida Railway and Navigation Company, passed respectively in 1856 and 1874, lands containing this class of deposits might be selected in satisfaction of the grants.[85] The reasons assigned were:—

(1) That the act of 1856 did not in terms reserve mineral lands;

(2) That in the act of 1874, where mineral lands are reserved, the word "mineral" is used in a limited sense, and cannot be construed to include phosphates.

This decision was subsequently overruled.[86]

We have fully explained the law as we understand it in the article on railroad grants.[87]

As a matter of *present* classification, Secretary Smith conceded that lands of this class are subject to entry under the mining laws, and lands containing phosphate deposits of all classes are undoubtedly mineral in character and subject to appropriation under the mining laws when the element of marketability at a profit is present. The department treats guano islands found within the public domain as mineral land.[88]

Prior to December, 1908, phosphatic deposits were discovered in Southeastern Idaho and adjacent parts of Wyoming and Utah. Limited areas were appropriated and some of these areas were patented under the mining laws. Later similar deposits were discovered in Montana. These deposits are utilized in the manu-

84 *Ante*, § 208.

85 Tucker v. Florida Ry. & Nav. Co., 19 L. D. 414.

86 Pacific Coast Marble Co. v. Northern Pac. R. R. Co., 25 L. D. 233; Florida Cent. & P. R. R. Co., 26 L. D. 600.

87 *Ante*, §§ 158, 159.

88 Richter v. State of Utah, 27 L. D. 95.

facture of super-phosphates by the addition of sulphuric acid, a by-product from the smelters, the manufactured product being used as a fertilizer. The lower grades are also used to some extent for soil dressing after being pulverized. The recognized great economic value and extent of these deposits induced their classification with coal, petroleum and natural gas in the proposed conservation measures alluded to in previous sections.[88a] At the present time, all public lands known or supposed on good evidence to contain valuable phosphate deposits are withdrawn by an order of the secretary of the interior from all forms of entry under the public land laws.[89]

§ 425a. **Manner of locating phosphate deposits.**— Prior to the discovery of the phosphatic deposits in Idaho, Wyoming and Utah, the department classified lands containing this class of minerals in Florida as placers. As noted in the preceding section, the deposits were of sedimentary origin of an alluvial type, and this manner of their occurrence suggested no question as to whether they should be appropriated as placers or as lodes. These western deposits are what are termed rock phosphates. In order to understand the embarrassments which subsequently arose and now exist with regard to the manner in which these deposits should have been or should be located, it is pertinent to explain how they occur. In this behalf, we quote from an exceedingly interesting monograph or report by Messrs. Hoyt S. Gale and Ralph W. Richards, appearing in Bulletin 430 of the United States Geological Survey:[90]—

88a §§ 200, 200a, 200b, 200c.

89 Bulletin No. 430, U. S. Geol. Survey, p. 535, by Hoyt S. Gale and Ralph W. Richards.

90 Page 461.

The rock phosphate deposits of the Idaho, Utah and Wyoming fields are original sedimentary formations laid down at the time when that part of the earth's surface was largely covered by water. Since the time in which the phosphatic strata were deposited other rock forming sediments have been accumulated so that many thousands of feet of subsequent strata have been accumulated, and have overlain or succeeded them. Deformation of the earth's crust has tilted, folded and broken these strata which originally lay flat. Uplift of the land or recession of the sea has subjected the rocks in their disturbed positions to stream erosion and the action of atmospheric agencies, so that great bodies of the more elevated parts have been removed entirely and the truncated edges of the rock strata are now exposed at the surface. The occurrence of the rock phosphate at the surface of the ground now depends on the geologic structure and more or less accidental relationships, such as absence of masking cover of later deposits, depths of erosion and many minor factors.

The rock phosphate deposits are thus more properly analogous to coal and limestone and especially to the Clinton iron ores of the Appalachian region than they are to ore deposits such as veins or lodes or to alluvial deposits.

As to whether these deposits should be classified as lodes or placers, the same authors say:—

In both the legal and the geologic meaning of the term, the Idaho rock-phosphate deposits are certainly "rock in place." They are analogous to most sedimentary building-stone deposits in the manner of their formation, but like coal they are also bodies of valuable mineral inclosed between walls. According to the scientific or geologic definitions, these deposits are not properly lodes or veins. In any sense, however, the western phosphate deposits do not conform to the placer type, and unless by specific

act of congress, it appears that there is so far no sufficient warrant for their location under the placer law.

Court decisions have not always upheld the strict or scientific definition of the term "vein" (or lode used in the same sense as vein), and there is, therefore, reasonable doubt as to the applicability or nonapplicability of that term in its legal sense to these phosphate deposits. Undoubtedly they are not veins or fissure fillings according to the accepted mineralogical or geologic definitions. The so-called popular mining use of the terms vein and lode very probably originated in large part through necessities arising from the inapplicability of the mining law. Loose interpretation has been forced in the effort to stretch the provisos of the law to cover conditions not provided for. Certain legal authorities—perhaps a majority—may be quoted as entirely in favor of a loose popular interpretation of the term "lode," so that bedded sedimentary rocks would also fall within that class. However justified this may be for the present status under the law, or however well substantiated in court decisions, the fact remains that it is incongruous and illogical and points to the need for special consideration by congress.

An interesting article appearing in the Engineering and Mining Journal[91] describes these deposits and presents a series of photographs which induce the conviction that they fall within the classification discussed in a previous section;[92] i. e., a deposit in place containing a nonmetallic substance in the general mass of the mountain and between well-defined boundaries.

The earlier attitude of the land department in the matter of classifying these deposits is concisely stated by Judge Van Fleet, United States District Judge, sitting in the district of Idaho, in a suit brought by a junior

[91] February 25, 1911, vol. 91, p. 413, by Claude T. Rice.

[92] § 323.

lode locator against a prior placer locator and patent applicant involving the question of proper classification.[93] After describing the manner in which the deposits occur, which description is similar to that above quoted from Bulletin 430 of the Geological Survey, the judge says:—

> The indefinite nature of these deposits, in the particulars noted, has induced the land department to vary somewhat inconsistently in its determination of the question whether they are properly the subject of lode location and to be sold as such, or to be located and sold as placer ground: the department having granted to the defendant a patent under a placer location for a claim in the midst of these here involved in the same deposit or bed, and allowed final entries on a number of other like locations on similar deposits in the same section of the country; whereas it has on the other hand, passed to patent a number of lode locations on the same character of formation within the general area above described.

As a matter of fact, claims in the rock-phosphate fields have been located in many instances as both lodes and placers by the same person, and sometimes as placers containing known lodes. When there was no hostile relocation or adverse claim, the question was not necessarily raised in the department and patents were not difficult to obtain under either classification. But where there were adverse locations, one set of locators claiming the land as placer and a later set relocating as lodes, or *vice versa*, the department was confronted with a somewhat embarrassing question. The latest rulings of which the author has any note are a decision by the commissioner of the general land office, September 24, 1910, in the case of Union Phosphate Co. v. Duffield,[94] in favor of the lode claimant

[93] Duffield v. San Francisco Chemical Co., 198 Fed. 942.

[94] Unreported.

and a decision by the secretary of the interior also in favor of the lode claimant.[94a] Congress has been appealed to and several measures have been proposed—on different lines. One series of measures proposed to recognize all locations, whether lode or placer, theretofore made, as valid, rights being determined by priority. As to future locations, they were to be made under the placer laws. Where lode patents were to be issued for lode locations previously made, there was to be no extralateral right allowed. There are also conservation measures pending which contemplate the leasing of these lands, the government retaining the right and to a certain extent controlling the output to prevent monopoly on the one hand, and ruinous competition on the other, and possibly to prevent exportation, if that should be within the power of congress. None of these proposed measures has become a law, although some of them are still pending. The various technical journals have given considerable space to the discussion, but have added little to the solution of the problem.[95]

In the case of Duffield v. San Francisco Chemical Company, decided by Judge Van Fleet, from which we have heretofore quoted,[96] it was held that the question as to whether under existing laws these deposits were to be located as lodes or placers was one for the land department to determine, as it involved the character of the land, and that the only question involved in the case which the court was called upon to determine,

[94a] Harry Lode Claim, 41 L. D. 403.

[95] See article by Claude T. Rice, vol. 91, Engineering and Mining Journal, p. 413. Editorials, vol. 98. Mining & Scientific Press, pp. 836, 862; Id., vol. 102, p. 422. Also an article by Mr. Carpel L. Breger in "The Mining World," referred to in the last-named editorial. Editorial Mining & Scientific Press, vol. 104, p. 849.

[96] 198 Fed. 942.

it being an adverse suit under section twenty-three hundred and twenty-six of the Revised Statutes, was the right of present possession. The court decided the case in favor of the placer claimant on the ground of priority, and on the further ground that the entry of the junior lode locator within the boundaries of the placer claim, under the protest of the placer claimant, was a trespass and no rights could be so initiated.

If this judgment remains in force when the roll is filed with the land department and it resumes jurisdiction,[97] it can hardly evade the question. It can hardly contend that the judgment in favor of the defendant has determined the character of the land, as this is an issue the determination of which is specially confided to the land department. This is pointed out very clearly in Judge Van Fleet's opinion.[98]

The circuit court of appeals for the eighth circuit has held that the courts in the first instance must pass upon the question, without undertaking to determine the effect of such decisions upon the officers of the land department.[98a]

It will be borne in mind that the situation in the rock phosphate areas does not present a case of a lode within a placer. The contending parties are claiming the same thing,—one as a lode, the other as a placer. The land on both sides of the deposit is valueless.

While holding no brief for either side of this controversy, it seems to the author that, if left to the department to determine, the following affords a solution:—

1. If the decisions by the circuit court of appeals of the eighth circuit, in Webb v. American Asphaltum

[97] *Post,* § 765.

[98] Citing Clipper Min. Co. v. Eli Min. Co., 194 U. S. 221, 223, 24 Sup. Ct. Rep. 632, 48 L. ed. 944, which quoted section 765 of the second edition of this work.

[98a] San Francisco Chemical Co. v. Duffield, 201 Fed. 830.

Company,[99] and in San Francisco Chemical Company v. Duffield,[100] correctly state the law, and it appears to us that there is no escape from it, these deposits fall in the category of lodes.

2. If the original discoverer, through an honest mistake, following rulings of the land department as to the Florida deposits, or under a misapprehension as to the proper method of location, locates in good faith as a placer, he should not lose the benefit of his discovery to the next comer who seeks to relocate as a lode. He should simply be required to amend his location, reform his lines and convert it into a lode location. This does no violence to the spirit of the law, gives to the discoverer, or first locator, the benefit of his discovery, and deprives no one of any substantial right. This method is simply a rational enlargement of the right to amend a location by casting off excess, which may be done regardless of an intervening locator.

3. The first locator locating as a lode would, of course, hold his claim as against a later locator seeking to challenge the first locator's classification by locating as a placer. There are no equities in favor of the second comer.

If the board of equitable adjudication, the functions of which are explained in a note to a subsequent section,[1] might be permitted to determine this question in the exercise of the equitable powers conferred upon it, we are satisfied that the foregoing solution would appeal to that tribunal.

§ 425b. Potash.—Potash is a mineral, and if found in deposits which could be exploited commercially at a

[99] 157 Fed. 203, 84 C. C. A. 651. See discussion *ante*, § 323.

[100] San Francisco Chemical Co. v. Duffield, 201 Fed. 830.

[1] § 677.

profit could be located under the mining laws. At the present time, with the possible exception of Searles Lake, in the desert region of Southern California, where it occurs in solution in the form of brine in combination with the chloride of sodium and other salts, there are no known surface deposits containing commercial quantities of potash salts. It exists as a constituent of certain eruptive rocks, but is so widely disseminated that it cannot be economically recovered by any known process. The brines and strata of salts containing potash are supposed to exist in the desert regions; the concentration in low depressions without outlets formed by a leaching process which has been going on since the beginning of local geological time. The United States imports practically all of its potash from the Magdeburg-Halberstadt region of Germany, principally from Stassfurt. In the form of a nitrate it is used for fireworks, brown powders and similar explosives, and to some extent as a fertilizer.

President Taft, in a special message to congress, March 26, 1912, called attention to the great value of potassium salts as an element in maintaining soil fertility, which message resulted in the passage of the act of August 24, 1912, amending the previous act of June 25, 1910,[2] through which the executive was empowered to withdraw lands containing all classes of nonmetalliferous substances from entry, occupation, location and purchase. This message was sent on recommendation of the geological survey, which has for some time been engaged in search for deposits of this mineral, in the desert regions of the west, with the expectation of making important discoveries. The deposits at Searles Lake, heretofore alluded to, were located some years ago for soda carbonate or trona, but this venture was not

2 See discussion *ante*, §§ 200, 200a, 200b, 200c.

successful. Subsequently they were found to contain potassium salts, and efforts are now being made to recover and market the product. Deposits of this mineral in form of brine are found in surface and subsurface depressions and also in the form of bedded deposits in connection with chloride of sodium (with which potash is invariably associated), and may undoubtedly be located as placers where the element of profitable value is found in the potash and not in the salt. Potash is saline in character, and it is contended in some official quarters that deposits containing it must be located under the law applicable to salines, which modifies the placer law by inhibiting the locating of more than one claim by one person. The saline law in terms provides that "salt springs, or deposits of salt in any form," are subject to location under the placer laws. Construing these terms, the land department has said that—

> Congress had in contemplation throughout merely common salt, or chloride of sodium, in its various forms of existence or deposit.[3]

The test, therefore, as to whether a deposit which contains both salt and potash should be located under the saline law limiting an individual to one location, or under the placer law, under which the number of locations an individual may make is unlimited, will depend on the comparative commercial value of the two substances.

If the deposit should be found, as is expected by the geological survey, in horizontal beds beneath the surface, the analogy of deep placers would probably apply.[4]

Potash occurs in another form which is attracting a great deal of attention. It is a constituent of sea water,

[3] Territory of New Mexico, 35 L. D. 1.

[4] *Post*, § 427.

and is secreted by the kelp which grows in enormous areas on the seashore of the Pacific, also in certain oceanic latitudes, as the famous Sea of Sargossa.[5] The government of the United States has caused extensive surveys to be made of the kelp-beds bordering the Pacific littoral, and the questions of their conservation and the control of a possibly important industry are being seriously considered. The beds of this marine plant lie invariably outside of the line of ordinary high tide, and by far the greater area lies within the marine league, subject to the jurisdiction and control (except for purposes of navigation) of the several states bordering on the ocean. As to these areas, the state alone can regulate and control the industry. It is in a sense analogous to the petroleum deposits below the line of high tide at Summerland, California, discussed in a subsequent section.[6]

As to kelp-beds beyond the marine league seawards, they are on the highway of nations, and beyond the exclusive control of any one government. The potash industry might be protected and conserved in the same way in which the sponge industry in the Gulf of Mexico is protected,—that is, by inhibiting the landing at any port of entry in the United States of any sponges taken at certain particular seasons of the year in certain latitudes beyond the jurisdiction of the United States.[7]

The indiscriminate harvesting of kelp at all seasons would prevent its reproduction and ultimately destroy the industry. To effectually conserve and regulate it, it would require the co-operation of both the state and nation.[8]

[5] It is said that one ton of air-dried kelp will yield five hundred pounds of pure potash and three pounds of iodine.

[6] *Post*, § 429.

[7] See The Abby Dodge v. United States, 223 U. S. 166, 167, 32 Sup. Ct. Rep. 310, 56 L. ed. 390.

[8] Senate Document No. 190, 62d Congress, 2d Session, "Fertilizer

§ 426. **Tailings.**—To suffer tailings to flow where they may, without obstructions to confine them, is equivalent to their abandonment.[9] If they lodge on the lands of another, they are considered as an accretion, and belong to him.[10] If they accumulate on vacant and unappropriated public land, it has been the custom in the mining regions of the west to recognize the right of the first-comer to appropriate them by proceedings analogous to the location of placer claims.[11]

As was said by the supreme court of Nevada,—

> Although not a mining claim within the strict meaning of the expression as generally used in this country, a "tailings claim" is so closely analogous to it that the propriety of subjecting the acquisition and maintenance of the possession of it to the rules governing the acquisition of the right to a strictly mining claim at once suggests itself.[12]

The land department has recognized this possessory right and permitted entries to be made of lands containing beds of tailings, under the laws applicable to placers. There are no adjudicated cases in the reports of department decisions upon this subject which have come under our observation, but we have knowledge of several instances where patents for this class of claims have been issued under the mining laws.[13]

Resources of the United States," contains a vast amount of reliable information on the subject.

9 Jones v. Jackson, 9 Cal. 238, 245, 14 Morr. Min. Rep. 72; Ritter v. Lynch, 123 Fed. 930.

10 Id.

11 Dougherty v. Creary, 30 Cal. 291, 89 Am. Dec. 116, 1 Morr. Min. Rep. 35; Ritter v. Lynch, 123 Fed. 930, 931.

12 Rogers v. Cooney, 7 Nev. 213, 14 Morr. Min. Rep. 85.

13 In Rhodes M. Co. v. Belleville Placer M. Co., 32 Nev. 230, 106 Pac. 561, 118 Pac. 813, plaintiff asserted rights to a deposit of tailings on land patented by the state to the plaintiff, who also asserted title to

§ 427. Subterranean gravel deposits in ancient river-beds.—Subterranean channels of ancient streams into which beds of auriferous gravels have been deposited are sometimes called deep, or ancient, placers. The most noted of these are found in California.[14]

These gravel-beds lie upon a "bedrock" which, at some period of geological history, formed the bed of an ancient river. At times the deposits are cemented. They are usually immediately overlain by a formation of clay gouge, and on this clay covering is a capping of lava, sometimes hundreds of feet in thickness. These subterranean deposits are reached by means of tunnels to the bedrock, and thence following the meanderings of the channel. These deposits certainly occupy a fixed position in the mass of the mountain, although they do not fall within the popular definition of lodes, or veins. The land department, at an early period, classified them as "placers," and patents have uni-

the tailings through an execution sale, in a suit brought against the mining company which deposited the tailings. Defendant located the land under the placer laws, claiming that under the doctrine of Rogers v. Cooney the tailings mineralized the land, and under the provisions of the state patent reserving the mineral and giving to others than the patentee the right to prospect and locate mines on the land, and under the decision in Stanley v. Mineral Union, 26 Nev. 55, 63 Pac. 59, 60, defendant was entitled to hold the tailings.

Plaintiff obtained a preliminary injunction against defendant inhibiting the removal of the tailings. On appeal the supreme court upheld the injunction, on the theory that the questions of law and fact were important and doubtful, and there was no abuse of discretion in granting the injunction.

[14] For interesting and valuable discussion on the subject of these deep gravels, see monograph of Mr. Ross E. Browne, "The Ancient River Beds of the Forest Hill Divide," California State Mineralogist's report (1890), p. 435, also a monumental work, "The Tertiary Gravels of the Sierra Nevada of California," by Waldemar Lindgren, Professional Paper 73, U. S. Geological Survey.

formly been issued upon locations of this class of deposits made under the placer laws.[15]

The supreme court of California has upheld this classification.[16]

The inconvenience of this rule will be shown when we come to consider the requirements as to a discovery within the limits of each placer location. But this is an argument which should be addressed to congress in order that this class of deposits may receive separate consideration and be relieved from conditions which are not unreasonable when applied to superficial placers, but which become exceedingly onerous and burdensome when applied to these subterranean deposits.

The general *situs* of these ancient rivers in the auriferous belt in California is well recognized. Their existence is a proved fact and not a mere theory.[17] They are classified as mineral lands by the land department, applications to enter them under agricultural laws having been refused.[18] This fact, however, is not tantamount to a discovery within the limits of a proposed placer location. This could only be accomplished either by drifting in the channel or by drilling from the surface.

The secretary of the interior has held that sand rock or sedimentary sandstone formation in the general mass of the mountain bearing gold is rock in place bearing mineral, and constitutes a vein or lode, within the purview of the statute, which can be located and entered

15 Commissioner's Letter, Copp's Min. Dec. 78.

16 Gregory v. Pershbaker, 73 Cal. 109, 115, 14 Pac. 401, 403.

17 Waldemar Lindgren in Colfax Folio of the Geological Survey.

18 Dixon v. Taylor, May 2, 1907, Decision by Secretary Garfield, not officially published. See vol. 95, Mining and Scientific Press, p. 123.

only under the law applicable to lode deposits.[19] The distinction between this class of deposits and the deep cemented gravels is not altogether obvious.

§ 428. Beds of streams.—As to whether gravel deposits lying on the beds of watercourses may be appropriated under the placer laws will depend on circumstances. If the stream is navigable, certainly no right to appropriate its bed for mining purposes under the federal mining laws can be sanctioned.

The beds of such rivers and their banks as far as high-water mark, in some states as far as low-water mark,[20] belong to the state, and not to the federal government. They were not granted by the constitution to the United States, but were reserved to the states respectively, and the new states have the same rights of sovereignty and jurisdiction with regard to this class of lands as the original states.[21]

The right of the United States to the public lands, and the power of congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant the beds of navigable streams.[22]

A grant from the government for land bordering on a navigable stream (i. e., one that is navigable in fact) can extend no farther than the edge of the stream.[23]

The state may, if it choose, resign to a riparian proprietor rights which properly belong to it in its sover-

19 In re Palmer, 38 L. D. 294.

20 Hull v. Hobart, 186 Fed. 426, 429, 108 C. C. A. 348.

21 Pollard v. Hagan, 3 How. 212, 224, 11 L. ed. 565; Pollard's Heirs v. Kibbe, 9 How. 470, 477, 13 L. ed. 220.

22 Pollard v. Hagan, 3 How. 212, 223, 11 L. ed. 565.

23 Packer v. Bird, 137 U. S. 661, 669, 11 Sup. Ct. Rep. 212, 34 L. ed. 819.

eign capacity,[24] but this does not sanction a conveyance from the general government which would operate to divest the rights of the state.

A mining claim located upon public lands traversed by a watercourse which is navigable in fact could only extend to the edge of the stream at its high-water or low-water stage, depending upon the laws of the state where the property is situated, as the rule as to the water boundary is not the same in all the states. The beds of such streams are not public lands.[25]

In general, the meander line is not a boundary and the grantee takes to the water's edge.[26]

While congress exercises legislative control over the territories and other political subdivisions not organized as states, it holds lands under the navigable streams in the public domain in trust for the future state, and it has always been the policy of the general government not to impair the right of the ultimate beneficiary by any permanent encumbrance or transfer of this class of lands. The rule on this subject is the same as that applied to lands below ordinary high tide in the case of tidal waters, a subject discussed in the next section.

The state may grant temporary privileges, or perhaps permanent rights, of dredging or carrying on other mining operations in the beds of navigable waters; *provided*, that such operations do not interfere

[24] Packer v. Bird, 137 U. S. 661, 669, 11 Sup. Ct. Rep. 212, 34 L. ed. 819.

[25] Argillite Ornamental Stone Co., 29 L. D. 585; In re Fitten, 29 L. D. 451, 453; In re Victor H. Johnson, 33 L. D. 593.

[26] Johnson v. Hurst, 10 Idaho, 308, 77 Pac. 784, 788, where the question is fully discussed and authorities reviewed. See, also, French Glenn Live Stock Co. v. Marshall, 28 L. D. 444; Hendricks v. Feather River Canal Co., 138 Cal. 423, 71 Pac. 496, 497; Kirby v. Potter, 138 Cal. 686, 72 Pac. 338, 339.

with the public rights of navigation or the private rights of riparian owners. But this is a subject which is not necessary to be here discussed.[27]

As to the beds of non-navigable streams, there is no reason why the gravel deposits lying on them may not be appropriated,[28] as the banks may (for it is there that placers are usually found), if the title to the bed resides in the general government and is clear of prior appropriations. No subsequent appropriation of the bed of a non-navigable stream can interfere with the rights of a prior proprietor bordering on the stream or having a right of access to it for any lawful purpose, e. g., diversion of appropriated water. In other words, the question to be considered is whether the bed sought to be appropriated is a part of the public domain or not.

As to what rights accrue to a placer locator to the water of a non-navigable stream found within the limits of the location, no definite rule can be stated. It will depend upon the locality in which the claim is situated. If in a state where the *ultra* doctrine of the common law prevails, his rights to the water would be limited to those of a riparian proprietor. If in a state where the riparian doctrines are abrogated or declared never to have been adopted, his right to use the water would depend upon its proper appropriation for that purpose, and the mere location of the placer claim would not of itself confer any right to the water.[29]

[27] Consult Coosaw M. Co. v. South Carolina, 144 U. S. 550, 12 Sup. Ct. Rep. 689, 36 L. ed. 537; State v. Black River Phosphate Co., 32 Fla. 82, 13 South. 640, 21 L. R. A. 189. See article by Dr. Rossiter W. Raymond in Engineering and Mining Journal, vol. 65, p. 276.

[28] Rablin's Placer, 2 L. D. 764.

[29] Text quoted and approved in Snyder v. Gold Dredging Co., 181 Fed. 62, 65, 104 C. C. A. 136. See, also, Van Dyke v. Midnight Sun M. & D. Co., 177 Fed. 85, 91, 100 C. C. A. 503.

Judge Hallett has said, with regard to a case arising in Colorado, that

> A placer location *ex vi termini* imports an appropriation of all waters covered by it in so far as such waters are necessary for working the mine. This is true, especially when the location covers both banks of the stream, because there is a reasonable presumption that the locator intends to work the channel and the banks wherever he may find pay dirt. A placer claim cannot be worked without water. . . . . The title to the water is the same as the title to the land.[30]

This rule was followed by the district court in Alaska,[31] but was condemned by the circuit court of appeals, eighth circuit, as not being supported by the better reasoning.[32] The circuit court of appeals of the ninth circuit, in a case arising in Alaska, upholds the doctrine that no right to the water of a stream accrues to the locator of a mining claim crossing such stream.[33] The land department has said that the rights of the placer locator to the water in such case is simply "usufructuary."[34] This question, however, is hardly germane to the subject presently under consideration. Its solution can only be arrived at from a careful investigation of the water laws of the various states. For this purpose treatises on the law of water should be consulted.[35]

§ 429. **Lands under tide-waters.**—There is no principle involved in the consideration of the public land

30 Schwab v. Bean, 86 Fed. 41.

31 Madigan v. Kongarok M. Co., 3 Alaska, 63.

32 Snyder v. Colorado Gold Dredging Co., 181 Fed. 62, 68, 104 C. C. A. 136.

33 Van Dyke v. Midnight Sun M. & D. Co., 177 Fed. 85, 91, 100 C. C. A. 503.

34 Rablin's Placer, 2 L. D. 764.

35 See 1 Wiel on Waters, 3d ed., p. 141, note 20.

system better settled or more clearly enunciated than that lands under tidal waters, and below the line of ordinary high tide, are not "public lands." When a state bordering upon these waters is admitted into the Union it becomes, by virtue of its sovereignty, the owner of all lands extending seaward so far as its municipal dominion extends,—i. e., in landlocked bays from headland to headland and from the line of ordinary high tide on the shore of the open ocean seaward to the distance of three miles, or a marine league. This same rule applies to islands off the coast which are within the municipal control of the state. This ownership, however, is subject to the public right of navigation.

As to lands of this character forming a part of the territory acquired by the federal government under treaties of cession and purchase which for the time being are not included within the boundaries of any state, but are either within territories (such as Hawaii, Porto Rico and Alaska), or insular dependencies with a temporary form of government specially devised to meet the exigencies of the occasion (such as the Philippine islands), the United States holds them in trust for the benefit of such states as may be ultimately carved out of them. With reference to this class of lands occupying this *status*, the supreme court of the United States has expressed itself as follows:—

> The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant for appropriate purposes titles or rights in the soil below high-water mark of tide-waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the

territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union.[36]

It follows from this doctrine that tide-lands bordering a territory cannot be acquired in private ownership under any of the general laws providing for the disposal of public lands, in which category are the federal mining laws. A mining claim cannot be so located as to extend below the line of ordinary high tide.[37]

The discovery in 1898 of the auriferous sands on the southern shore of the Seward peninsula in Alaska, washed by the Bering Sea, attracted an army of fortune-hunters, and the beach in the immediate vicinity of Cape Nome was the scene of great mining activity. The federal mining laws had been extended to Alaska, but as the gold-bearing sands were found to exist below the line of ordinary high tide, there was practically no law which permitted their appropriation or exploitation below that line. As in the case of the discovery of gold in California at a time when there was no federal law whatever on the subject of acquiring public mineral lands, the miners adopted rules and regulations defining the manner of acquiring, possessing, and enjoying mining privileges on beach claims. As it was conceived that a license could be obtained from the secretary of war, whose permit was necessary as a prerequisite to the maintenance of structures in the navigable waters of the United States, such license was

[36] Shively v. Bowlby, 152 U. S. 1, 58, 14 Sup. Ct. Rep. 548, 38 L. ed. 331; San Francisco Savings Union v. R. G. R. Petroleum & M. Co., 144 Cal. 134, 103 Am. St. Rep. 72, 1 Ann. Cas. 182, 77 Pac. 823, 66 L. R. A. 242; Kneeland v. Korter, 40 Wash. 359, 82 Pac. 608, 609, 1 L. R. A., N. S., 745, and numerous cases cited.

[37] In re Logan, 29 L. D. 395.

asked and in many instances obtained. These licenses, of course, conferred no rights save immunity from prosecution for carrying on mining operations in navigable waters. The roadstead was an open one, there were no harbor lines, and the permit was granted whenever applied for. These conditions were recognized by congress, and provisions were inserted in the Alaska code[38] governing the exploration and mining of these beach deposits between low and mean high tide on the shores, bays, and inlets of Bering Sea, and authorizing mining below the line of low tide under such regulations as might be prescribed by the secretary of war. This statute is, of course, local in its application. The code specifically sanctioned the adoption of local rules governing the size of the claims, and other details not necessary to be here noted. The act does not contemplate that these beach claims below the line of ordinary high tide shall be patented, the privilege being limited to exploration and mining for gold.

Off the coast of California, at Summerland, in Santa Barbara county, petroleum wells are drilled in the ocean below the line of ordinary high tide, and large quantities of crude oil are produced. The secretary of war has granted the same class of permits as noted in the case of Cape Nome, which are, as heretofore observed, ineffectual as conferring any rights as against the littoral owner.[39] The title to the soil is in the state of California. The state might dispose of it if such disposal and the purposes for which it was made might be effected without detriment to the public right of navigation.[40] There is no permission granted by the

[38] § 26. See Appendix.

[39] San Francisco Savings Union v. R. G. R. Petroleum Co., 144 Cal. 134, 103 Am. St. Rep. 72, 1 Ann. Cas. 182, 77 Pac. 823, 66 L. R. A. 242.

[40] Messenger v. Kingsbury, 158 Cal. 611, 112 Pac. 65, 66. By act of the legislature of California passed March 25, 1909 (Pol. Code, § 3443a),

state, but it has not interfered, and the occupants have not been molested by the only authority which possesses any power in the premises—the state of California. Some conflicts have arisen with the littoral owners. It has been held that the erection of obstructions below ordinary high-water mark in front of the land of a littoral proprietor, which obstructions interfere with and prevent access to and use of the ocean highway by the littoral proprietor, constitutes a private nuisance as to him and he may maintain an action to abate it.[41]

We have heretofore alluded to the existence of extensive kelp-beds growing in the sea floor in the Pacific within the marine league, and the possibility that the industry of harvesting the marine flora for its potash content may be of large importance. State legislation is requisite to regulate all industrial activities in tidal waters within the marine league.[42]

Article II. The Location and Its Requirements.

§ 432. Acts necessary to constitute a valid placer location under the Revised Statutes, in the absence of supplemental state legislation and local district rules.

§ 433. Requisites of a valid placer location where supplemental state legislation exists.

lands between high and low water mark and over which the tide ebbs and flows are withheld from sale.

41 San Francisco Savings Union v. R. G. R. Petroleum Co., 144 Cal. 134, 103 Am. St. Rep. 72, 1 Ann. Cas. 182, 77 Pac. 823, 66 L. R. A. 242.

42 *Ante*, § 425b.

§ 432. Acts necessary to constitute a valid placer location under the Revised Statutes, in the absence of supplemental state legislation and local district rules. Generally speaking, the acts required to be performed in order to complete a valid location under the federal laws applicable to placers are the same as are required in cases of lode locations.[43]

Section twenty-three hundred and twenty-nine of the Revised Statutes provides:—

> Claims usually called placers, including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent under like circumstances and conditions as are provided for vein or lode claims.

The purpose of this section is apparently to place the location of placer claims on an equality both in procedure and rights with lode claims.[44]

This has been construed to mean:—

(1) That there must be a discovery upon which to base the location;[45]

(2) The location, if on unsurveyed lands, must be marked upon the ground so that its boundaries can be readily traced. If on surveyed land, where the loca-

[43] McCann v. McMillan, 129 Cal. 350, 62 Pac. 31, 33.

[44] Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 227, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

[45] McDonald v. Montana Wood Co., 14 Mont. 88, 43 Am. St. Rep. 616, 35 Pac. 668, 669; Lincoln Placer, 7 L. D. 81; Ferrell v. Hoge, 18 L. D. 81, 19 L. D. 568; Louise M. Co., 22 L. D. 663; Rhodes v. Treas, 21 L. D. 502; S. P. R. R. v. Griffin, 20 L. D. 485; Reins v. Murray, 22 L. D. 409; Union Oil Co., 23 L. D. 222; Bay v. Oklahoma Southern Gas & Oil Co., 13 Okl. 425, 73 Pac. 936, 938; Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 1084, 74 Pac. 444; affirmed, Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. Rep. 468, 49 L. ed. 770; Weed v. Snook, 144 Cal. 440, 77 Pac. 1023, 1025; Whiting v. Straup, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849, 853; Phillips v. Brill, 17 Wyo. 26, 95 Pac. 856, 859; Merced Oil Co. v. Patterson, 153 Cal. 624, 96 Pac. 90; S. C., second appeal, 162 Cal. 358, 122 Pac. 950, 951.

tion is by legal subdivisions and there is no state statute on the subject, the question as to whether physical markings on the ground are necessary is controverted, and the authorities are not harmonious. This subject will be discussed in subsequent sections.[46]

As was said in a previous section, referring to lode claims, no notice need be posted, no particular kind of marking is required, nor is any record made necessary. No preliminary development work is prescribed. In the absence of supplemental state or local regulation the discovery and marking the boundaries perfect the location.[47]

§ 433. Requisites of a valid placer location where supplemental state legislation exists.—As in the case of lodes,[48] most of the states within the purview of this treatise have enacted laws prescribing that certain acts be performed in order to perfect a placer location, in addition to the requirements of the federal law. These supplemental provisions vary in the different states. Taking the Colorado statutes as a type (although the laws of some of the states are more elaborate), the following acts are required to complete a location of this class:—

(1) Discovery;

(2) Posting a notice of location;

(3) Marking the boundaries in a specified manner;

(4) Recording a certificate of location.

As these features are common to both lode and placer claims, what we have heretofore said with reference to the necessity of complying with these conditions,[49] the

[46] *Post*, §§ 454, 455.
[47] *Ante*, § 328.
[48] *Ante*, § 329.
[49] *Ante*, § 329.

order in which the acts may be performed,[50] and the effect of locations made by agents,[51] need not be here repeated.

ARTICLE III. THE DISCOVERY.

§ 437. Rules governing discovery the same as in lode locations.
§ 438. Unit of placer locations — Discovery in each twenty-acre tract.
§ 438a. Boundary line discoveries.
§ 438b. Conveyances of part of location prior to discovery.
§ 438c. Unit of placer location in Alaska.

§ 437. Rules governing discovery the same as in lode locations.—The subject of discovery has been fully considered when dealing with lode locations in a previous article.[52] The principles there announced apply with equal force to placers, so far as the character of the deposits will admit. Discovery is just as essential in case of placers as it is in lode locations.[53] The supreme court of California at one time expressed the view that neither the federal laws nor the local rules and customs of miners required that a discovery should be made as a prerequisite to a placer location,[54] but this was obviously a mere *dictum;* it was also opposed to the current of judicial authority, as was subse-

[50] *Ante,* § 330.

[51] *Ante,* § 331.

[52] *Ante,* §§ 335–339.

[53] Nevada Sierra Oil Co. v. Miller, 97 Fed. 681, 688; Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 676; Olive L. & D. Co. v. Olmstead, 103 Fed. 568, 573; Cosmos Exploration Co. v. Gray Eagle Co., 112 Fed. 4, 14, 50 C. C. A. 79; Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 1084, 74 Pac. 444; affirmed, 197 U. S. 313, 320, 25 Sup. Ct. Rep. 468, 49 L. ed. 770; New England & Coalinga Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180, 181; Whiting v. Straup, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849, 853; Steele v. Tanana Mines R. Co., 148 Fed. 678, 679, 78 C. C. A. 412; Garabaldi v. Grillo, 17 Cal. App. 540, 120 Pac. 425; Hall v. McKinnon, 193 Fed. 572, 576.

[54] Gregory v. Pershbaker, 73 Cal. 109, 117, 14 Pac. 401.

quently so determined by the same court.[55] The land department has uniformly held that discovery is essential in the case of placers, going so far at one time as to hold that such discovery was essential in each twenty-acre tract within a location of one hundred and sixty acres located by an association of persons.

In the case of ordinary surface deposits such as the auriferous gravels, we encounter no serious difficulty in determining the sufficiency of a given discovery. The existence of the deposit is obvious, and the only inquiry is as to its commercial value or the extent of its mineral contents as justifying the expenditure of time and money in its development and exploitation. Where, however, the deposit which it is desired to locate is beneath the surface and is found at considerable depth, so that discovery in its technical sense, at or near the surface, is impracticable, the courts have been somewhat embarrassed in applying the law. While leaning sympathetically with the first appropriator, they have never gone so far as to say that a discovery may be dispensed with.

The best known of these deposits are the ancient river channels which are overlain by lava or other capping many hundreds of feet in thickness, some of the important gravel deposits in Alaska which underlie "muck" or detrital accumulations of varying thickness, and petroleum and natural gas, which are found at great depths, at times several thousands of feet below the surface. With the exception of fugitive colors found in the overlying "muck" of the Alaska placers, there is rarely any surface indication of the existence of these minerals below the surface sufficient to satisfy the law as to discovery. While their exist-

[55] New England & Coalinga Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180, 181.

ence and their *situs* may be scientifically demonstrated, this will not satisfy the law; there must be an actual physical demonstration by the exposure and production of mineral within the limits of the location.[56]

In the case of petroleum deposits the courts in California have in recent years been confronted with some serious problems upon the subject of what constitutes a sufficient discovery which will sanction a location of oil lands under the laws applicable to placers. It is well known that the natural habitat of this class of mineral hydrocarbons is in stratified rocks some distance below the surface, and except for the occasional appearance at the surface in the form of oil seepages, springs, or other indications of the subterranean existence of petroleum, there is nothing to guide the miner in making his location. It requires more or less extensive development in the nature of well-drilling and prospecting to determine the nature, extent, and permanency of the deposit.

With reference to these surface indications, Judge Ross, United States circuit judge for the southern district of California, expressed the view that—

> Mere indications, however strong, are not, in my opinion, sufficient to answer the requirements of the statute, which requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws, the discovery of mineral within the limits of the claim. . . . . Indications of the existence of a thing is not the thing itself.[57]

[56] Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 675, 20 Morr. Min. Rep. 283.

[57] Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 675, 20 Morr. Min. Rep. 283. Cited and followed in Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 1084, 74 Pac. 444; S. C., in error, 197 U. S. 313, 25 Sup. Ct. Rep. 468, 49 L. ed. 770; New England & Coalinga Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180; Whiting v.

This was said, however, not of indications existing within the boundaries of the claim in controversy, but in adjoining lands.

> So, in respect to placer claims [said Judge Ross], if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay.[58]

This is in consonance with the rule announced by the courts in the case of lodes, that neither the size nor richness of the vein is material, so long as there is a genuine discovery.[59] A discovery of such indications as would in a given district lead a miner to the more valuable deposit, according to the experience in that district would sanction a mining location.[60]

This was said, however, of a lode discovery upon the theory that there was some direct connection in depth between commercial ore bodies and the surface indication.[61] The principle cannot logically be extended to oil seepages occurring sporadically. Such seepages are not sufficient to constitute a discovery.[62]

Straup, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849, 854; Bay v. Oklahoma Southern Oil & Gas Co., 13 Okl. 425, 73 Pac. 936, 940. See, also, Tulare Oil & M. Co. v. S. P. R. R., 29 L. D. 269.

58 Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 676, 20 Morr. Min. Rep. 283.

59 *Ante*, § 336.

60 Shoshone M. Co. v. Rutter, 87 Fed. 801, 806, 31 C. C. A. 223. See Kern Oil Co. v. Clotfelter, 33 L. D. 291; Steele v. Tanana Mines R. Co., 148 Fed. 678, 679, 78 C. C. A. 412; Lange v. Robinson, 148 Fed. 799, 801, 79 C. C. A. 1; Charlton v. Kelly, 156 Fed. 433, 436, 84 C. C. A. 295, 13 Ann. Cas. 513.

61 See *ante*, § 336.

62 Southwestern Oil Co. v. Atlantic Pacific R. R. Co., 39 L. D. 335.

Of course, exploitation on adjacent lands might raise a strong presumption that a given tract contained petroleum. An oil-producing well within each of four sections of land surrounding a fifth would produce a conviction that the oil deposit was underneath the fifth section. This fact might justify the land department in classifying the section in the category of mineral lands,[63] or the government surveyor in returning it as such,[64] but it would not dispense with the necessity of making a discovery.[65]

It is impossible to lay down any arbitrary rule to govern all cases as to what may be a sufficient discovery upon which to predicate a location. It is a question of fact, to be determined from a consideration of all the circumstances and surroundings.[66]

In certain areas in the oil region of California there are large surface deposits of gypsum overlying territory supposed to contain oil, and numerous attempts have been made to locate the land containing these deposits, based upon the discovery of gypsum, but they have, as a rule, been unsuccessful. The gypsum possesses no economic value; that is, it cannot be marketed at a profit, and that the land is not sought for this substance but for petroleum assumed to underlie it is in most instances obvious. The so-called "gypsum discoveries" have found no favor with the land department.

In order to, in a measure, relieve the prospector from the hardship of a strict enforcement of the law as to discovery, some of the courts have expanded the doc-

63 Kern Oil Co. v. Clotfelter, 33 L. D. 291; Hirshfeld v. Chrisman, 40 L. D. 112.

64 State of Washington v. McBride, 25 L. D. 169, 181.

65 Reins v. Murray, 22 L. D. 409.

66 Cascaden v. Bortolis, 162 Fed. 267, 271, 89 C. C. A. 247. *Ante*, § 336.

trine of *pedis possessio* (which ordinarily is understood to mean the limited space on which the locator is engaged in actual work), so as to protect the entire surface of a location from entry by others seeking to locate, if the prior locator, having located without discovery, is actually working at some point within the boundaries of his location, a subject fully discussed in a preceding section.[67]

As to "muck" discoveries in Alaska, the courts have been somewhat lenient where the controversy is between adverse mining claimants. A typical case involving the question of sufficient discovery is Cascaden v. Bortolis, decided by the circuit court of appeals, ninth circuit, from which we quote:—

> How is the prospector for placer gold to be guided? He discovers gold, a few cents only to the pan. He knows he is in a gold-bearing placer region, but is unacquainted with any distinct characteristics of the mineral-bearing area in the vicinity where he has made his discovery. Naturally, he does not wish to make a location unless the mineral discovered is of sufficient value to justify the belief that the ground will be valuable for placer mining. He is thus confronted with the need of deciding whether or not he is justified in spending his time and money in going ahead with his work, expecting to find gold in paying quantities. To aid him in making up his mind, he will consult miners who are experienced in that particular district. He will find out the special character of the country about, and will at once gather all the knowledge he can readily obtain of how the adjacent claims are paying, where the pay-streak is likely to be, and what amount of gold was discovered by the miners who located such other claims and developed them afterward, and what method of development was adopted; and when he has informed himself upon these matters, he will use

[67] *Ante*, § 218.

the information, together with the fact that he has found mineral, as a basis for a justification for action, and, if the justification for his action is well founded, the facts and circumstances upon which it was based are proper to be shown.[68]

A more rigid rule, however, is applied where there is a prior agricultural claimant in possession and an attempt is made to locate the land or parts of it under the placer mining laws.[69] As to the ancient river channels or deep auriferous placers, the only method of discovery from the surface is by shafts or boring, except in the rare cases where erosion in the sides of gorges or canyons has exposed the gravels lying on their ancient beds. We have described these deposits in a previous section.[70]

The state of New Mexico has a unique statute which allows a locator ninety days from the date of location in which to make a discovery of mineral other than oil or gas, and until the end of the calendar year to make discovery of oil or gas. The wisdom of some such provision as to oil and gas may readily be conceded. But it is a subject entirely in the control of congress. Under the federal law a location without discovery possesses no validity. It is doubtful, at least, if states may extend the time for discovery. However, the effect of such a statute may be to recognize a possessory right where a location is made without discovery, which may be enforced in the local courts—a right, however, which, as we have heretofore noted, is now upheld in certain jurisdictions, under certain conditions, as to petroleum locations.[71]

68 Cascaden v. Bortolis, 162 Fed. 267, 271, 89 C. C. A. 247. See, also, Lange v. Robinson, 148 Fed. 799, 803, 79 C. C. A. 1; Charlton v. Kelly, 156 Fed. 433, 437, 13 Ann. Cas. 513, 84 C. C. A. 295.

69 Steele v. Tanana Mines R. Co., 148 Fed. 678, 680, 78 C. C. A. 412.

70 *Ante*, § 427.

71 *Ante*, § 218.

§ 438. **Unit of placer locations—Discovery in each twenty-acre tract.**—We have heretofore observed that the unit of lode locations is a surface area aggregating a fraction over twenty acres, and that it is immaterial how many or how few locators participate in that class of locations.[72]

We shall see in a succeeding article that the rule in regard to placers is somewhat different. In placers, the unit of the location is twenty acres to each individual, with a maximum (except in Alaska) of one hundred and sixty acres to an association of persons. In other words, unless limited by local rules, and assuming that local regulations may prescribe such a limitation,[73] a single individual may locate a twenty-acre tract, but no more. Where more than one person (not exceeding eight) participate, an area equivalent to twenty acres to each is permitted; but they locate the whole area jointly, becoming tenants in common thereof, and are not, according to the practice, required to each locate a particular specified twenty-acre tract.

Some of the earlier decisions of the land department held that a discovery on each twenty acres of an association placer location was essential in order to hold the entire area.[74] But the rule is now well settled both by the courts and the land department that one discovery within the limits of an association location is sufficient.[75] The land department, however, while recog-

[72] *Ante*, § 361.

[73] Copp's Min. Dec. 164.

[74] Ferrell & Hoge, 18 L. D. 81; S. P. R. R. Co. v. Griffin, 20 L. D. 485; Rhodes v. Treas, 21 L. D. 502; Louise M. Co., 22 L. D. 663; Union Oil Co., 23 L. D. 222. See Ferrell v. Hoge, in review, 19 L. D. 568.

[75] Union Oil Co., in review, 25 L. D. 351, 358; Ferrell v. Hoge, 27 L. D. 129; Reins v. Raunheim, 28 L. D. 526; Ferrell v. Hoge, 29 L. D. 12; McDonald v. Montana Wood Co., 14 Mont. 88, 43 Am. St. Rep. 616, 35 Pac. 668, 669; Whiting v. Straup, 17 Wyo. 1, 129 Am. St. Rep. 1093,

nizing this rule, takes the position that a single discovery within a placer location does not conclusively establish the mineral character of all the land within it, and that this question is open to investigation by the department at any time until patent has issued.[76] There is no legal inference that because a given twenty-acre tract within an area of one hundred and sixty acres is mineral in character, the adjoining tracts or others are of the same character.[77]

In determining the character of the land embraced in a placer location, ten-acre tracts normally in square form are the units of investigation and determination, and if any such are found to be nonmineral, they should be eliminated from the claim.[78] Nonmineral surface land is not permitted for the convenient working of the claim.[79]

The determination of this question of character of the land is undoubtedly aided by reports of the geological survey in cases of petroleum, natural gas and deep placers, where the existence and extent of these subterranean deposits which have been developed in contiguous or adjacent territory may be, problematically at least, determined by geological investigations.[80]

While the land department must be satisfied of the mineral character of the entire tract, it must be noted

95 Pac. 849, 854; Nome & Sinook Co. v. Snyder, 187 Fed. 385, 388, 109 C. C. A. 217, 1 Water & Min. Cas. 202; Hall v. McKinnon, 193 Fed. 572, 574; Cook v. Klonos, 164 Fed. 529, 537, 90 C. C. A. 403.

[76] Ferrell v. Hoge, 29 L. D. 129; American Smelting & Refining Co., 39 L. D. 299. See, also, State of Washington v. McBride, 25 L. D. 167, 182.

[77] Dughi v. Harkins, 2 L. D. 721, quoted in Davis v. Weibbold, 139 U. S. 507, 522, 11 Sup. Ct. Rep. 628, 35 L. ed. 238, and in United States v. Central Pac. R. R. Co., 93 Fed. 871, 874.

[78] American Smelting & Refining Co., 39 L. D. 299.

[79] Ferrell v. Hoge, 29 L. D. 12.

[80] *Ante*, § 103.

in this connection that it is not necessary that the mineral nature of the deposits should be the same in all parts of the claim. They may be different in different parts of the same area, provided they are all placer in character,—that is, not "in place." [81]

A discovery when made validates the location as to the area claimed, if within the legal maximum and if made by the requisite number of persons, but it will not sanction an amendment to the location which would increase the area, where the original location embraces less than the maximum. The newly added area is not entitled to the benefit of the original discovery.[82] A discovery should be made in the added area.

§ 438a. Boundary line discoveries.—The great expense involved in making a satisfactory discovery in the oil regions has suggested the obviously economic method of drilling a well on the boundary line of the claims or at the corner common to three or four, with a view of making a discovery simultaneously on all of the contiguous claims through the one well.

In a previous section[83] we have discussed lode discoveries through the medium of a shaft bisecting an end-line boundary common to two claims, and reached the conclusion that where such shaft disclosed the existence of a part of the apex of a vein in each location, both locations would be valid, and this result would follow whether both locations were made by the same or by different parties. The principle upon which this conclusion rests is the necessity that some part of the apex of the vein should be demonstrated to exist in

[81] Ferrell v. Hoge, 29 L. D. 12.

[82] Weed v. Snook, 144 Cal. 439, 77 Pac. 1023, 1025; Biglow v. Conradt, 159 Fed. 868, 871, 87 C. C. A. 48.

[83] § 337.

each location, and when this condition is shown to exist, the letter and spirit of the law is satisfied. We have heretofore alluded to a possible confusion in the decisions between the discovery and the discovery shaft.

With reference to petroleum locations, we are not aware of any state legislation which requires "discovery shafts" as a prerequisite to the completion of the location. Such a requirement would be obviously absurd. In reaching a solution of the question as to validity of a discovery made through drilling a boundary line well as the basis of two or more petroleum locations, there is no opportunity for confusing the discovery with the discovery shaft.

As to the validity of such discoveries, so far as the courts and the published decisions of the secretary of the interior are concerned, the question is *res integra*. It was mooted but not decided in a case considered by the supreme court of Wyoming.[84] This was a case of a boundary line well; the court held as follows:—

> All that the record discloses as to the precise point of discovery is the surface situation of the well. In the absence of anything to the contrary, we think the fact that one-half the diameter of the well at its surface is in the claim is sufficient showing of discovery within the claim. Although it was argued that the well may not have followed a straight line in its descent and that its course may have deviated from such line and away from these premises, there is not the slightest evidence to indicate such a condition, and we are not, therefore, at liberty to infer that it exists.

If it be conceded that the object of compelling a discovery as the basis of a location is to demonstrate the

[84] Phillips v. Brill, 17 Wyo. 26, 95 Pac. 856, 859. See, also, Dean v. Omaha-Wyoming Oil Co. (Wyo.), 128 Pac. 881, 883.

actual existence of mineral within the boundaries of the claim, as well as to reward the discoverer, and as to this there can be no dissent, it cannot be denied that a boundary line well which reaches and determines the existence of the deposit establishes the incontrovertible fact that petroleum exists and has been actually discovered in every location penetrated by the well. If any portion of an apex discovered in a lode location is sufficient to support such location, it would seem that a discovery of petroleum made through the instrumentality of a boundary line well should inure to the benefit of every location into which it penetrates. This, we think, would be true where the ownership of all the claims was in the same person; it would also be true if the well were drilled by co-operation and agreement between two or more contiguous owners.

As we shall later point out,[85] the owners of an association placer claim may convey a part of its area prior to discovery, with an agreement that when discovery is made in the conveyed portion, it will inure to the benefit of the unconveyed part. Such being the case, what objection, from a legal standpoint, can there be to an agreement between coterminous owners that a well shall be drilled on joint account on a boundary or at a corner common to the claims and when a discovery is made that it should inure to the benefit of all the claims?

As pointed out by the supreme court of the United States, claim owners are permitted to combine and work their properties together where the burden of single-handed development might be prohibitive,[86] and

[85] § 438b.

[86] Jackson v. Roby, 109 U. S. 440, 445, 3 Sup. Ct. Rep. 301, 27 L. ed. 990,

are permitted to make joint entry of contiguous tracts regardless of size.[87]

We are of the opinion that a rational interpretation of the law sanctions the utilization of boundary line wells as a means of discovery in the oil region, and where such a discovery is made through this instrumentality, it should inure to the benefit of all locations penetrated by the well. The reasoning of the supreme court of California in the case of Merced Oil Mining Co. v. Patterson,[88] by implication at least, supports this doctrine.

Necessarily the boundary to be bisected with a well would have to be located with mathematical precision,[88a] but this does not affect the principle.

§ 438b. Conveyance of parts of placer locations prior to discovery.—Chief Justice Beatty, of the supreme court of California, in a vigorous dissent from the majority opinion in the case of Miller v. Chrisman,[89] expressed the view that as there could be no location of a mining claim before discovery, there can be no transfer or assignment of a location before the location is complete. In other words, there can be no assignment of the right to locate. If, in expectation of a discovery, an association of persons marks the boundary of a placer claim containing twenty acres for each associate, they would be protected in their possession while they proceed with reasonable diligence to pros-

87 St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 653, 26 L. ed. 875, 11 Morr. Min. Rep. 673.

88 153 Cal. 624, 96 Pac. 90, 92.

88a For an instance where a well intended to be drilled on the boundary but missed it, see Dean v. Omaha-Wyoming Oil Co. (Wyo.), 128 Pac. 881, 883.

89 140 Cal. 440, 452, 98 Am. St. Rep. 63; majority opinion, 73 Pac. 1083; dissent, 74 Pac. 444.

pect the claim and that by discovery they will perfect it; but if some of the associates withdraw before discovery, or attempt to assign their claims to those who continue the work of the development, those who remain will have no right to claim a greater area in the aggregate than they could have taken by an original location. In other words, an association of placer locators, having located without discovery one hundred and sixty acres, convey the entire title to one of them or to a stranger—subsequently the individual holding the entire title makes a discovery. This discovery entitles him to hold only twenty acres, as that is all he could acquire by an individual location. The majority of the court, however, held that such a conveyance by the associates to one of them was valid.[90]

The case was taken to the supreme court of the United States on writ of error and the judgment was affirmed, without, however, discussing this question.[91]

The doctrine of Miller v. Chrisman was followed in principle in Weed v. Snook.[92] In Merced Oil Co. v. Patterson,[93] Chief Justice Beatty participating in the opinion, the rule was extended so as to apply to conveyances by the associates to a stranger, and it was there held that a discovery made by the grantee validated the entire location, provided that there was an agreement between the vendor and vendee that a discovery when made should inure to the benefit of the entire location as originally made. No such agreement was

90 140 Cal. 440, 98 Am. St. Rep. 63, 74 Pac. 444.

91 Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. Rep. 468, 49 L. ed. 770. See comment on this case by the supreme court of California, in Merced Oil Co. v. Patterson, 162 Cal. 358, 122 Pac. 950, 952, and by the secretary of the interior in Bakersfield Fuel & Oil Co., 39 L. D. 460, 462.

92 144 Cal. 439, 77 Pac. 1023, 1025.

93 153 Cal. 624, 96 Pac. 90.

shown in the record then before the court, but the defect was supplied on a retrial.[94]

The land department originally stood sponsor for the rule contended for by Chief Justice Beatty in the Miller-Chrisman case,[95] specifically declining to follow the majority opinion of the court in that case,[96] thus creating a sharp controversy between that department and the courts which required an act of congress to settle.

On March 2, 1911, congress acted by passing a law which provided—

> That in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil or gas, solely because of any transfer or assignment thereof, or of any interest or interests therein by the original locator or locators or any of them to any qualified persons or person or corporation, prior to discovery of oil or gas therein, but if such claim is in all other respects valid and regular, patent therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof as in other cases; *provided*, however, that such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry.[97]

§ 438c. Unit of placer claims in Alaska.—Under an act of congress passed August 1, 1912, no association placer claim in Alaska located after the passage of the act can exceed forty acres. The unit of a placer location remains twenty acres to the individual. The same

94 Merced Oil Co. v. Patterson, 162 Cal. 358, 122 Pac. 950, 952.

95 In re Yard, 38 L. D. 59.

96 Bakersfield Fuel & Oil Co., 39 L. D. 460, 462.

97 36 Stats. at Large, p. 1015; Comp. Stats. (Supp. 1911), p. 612; 1 Fed. Stats. Ann. (Supp.), p. 270; In re Graham et al., 40 L. D. 128.

act contains provisions with regard to annual work, form of location and limitation on number of locations an individual may make, in his own right and by power of attorney, which will be hereafter discussed. The act is quoted in full in a previous section.[98]

Article IV. State Legislation as to Posting Notices and Preliminary Development Work.

§ 442. State statutes requiring posting of notices on placers.
§ 443. Preliminary development work required by state laws upon placer locations.

§ 442. State statutes requiring posting of notices on placers.—The general observations upon the subject of posting notices following lode discoveries, found in a preceding section,[99] apply with equal force to all classes of locations upon the public mineral lands. With the exception of the common custom generally observed, as there indicated, the posting of a notice is the subject of state or local regulation, in the absence of which none is required.

Some of the states have enacted laws upon the subject with regard to placers, a brief epitome of which will not be out of place:—

Arizona.—Same as lode claims, except that the notice must contain the number of acres claimed instead of the requirements of subdivisions four and five of the section concerning contents of notice on lode claims.[100]

California.—The same as in lode claims, except that the number of feet or acreage claimed must be given, and where the United States survey has been extended

[98] § 332.
[99] *Ante*, § 350.
[100] Rev. Stats. 1901, §§ 3232, 3242. *Ante*, § 353.

over the land embraced in the location, the claim may be taken by legal subdivisions with no other reference than those of said survey.[1]

Colorado.—Before recording (thirty days from discovery) the discoverer must post upon the claim a notice containing: (1) The name of the claim; (2) The name of the locator; (3) Date of discovery; and (4) Number of feet or acres claimed.[2]

Idaho.—Requirements are practically the same as in lode claims.[3]

Montana.—The same as in lode claims, except that the number of feet or acres claimed, instead of the length of the lode, must be designated in the notice.[4]

Nevada.—Same as Colorado.[5]

New Mexico.—The locator is required, at the time of making the location, to post at a designated corner of the claim a notice stating the name of the claim, the purpose and kind of material for which such claim is located, the names of the locators, a description of the claim, by legal subdivisions if on surveyed lands, or by metes and bounds if on unsurveyed land.[6]

South Dakota, Oregon, and North Dakota.—If any notice is required to be posted, it is the same as in the case of lode claims.[7] Placers are not specially named in their laws upon the subject of posting notices, and it is doubtful if they were intended to apply to placer locations.

1 Civ. Code, § 1426c.

2 Mills' Ann. Stats., § 3136; Rev. Stats. 1908, § 4205.

3 Laws 1895, p. 25, §§ 2, 12, as amended—Laws 1897, p. 12; Civ. Code 1901, § 2563; Rev. Code 1907, § 3222. *Ante*, § 354.

4 Rev. Code 1895, § 3610; amended 1901, p. 140; 1907, p. 18; Rev. Code 1907, § 2284. *Ante*, § 352.

5 Comp. Laws 1900, § 220; Rev. Laws 1912, § 2434.

6 Laws 1909, p. 190.

7 *Ante*, § 353.

Utah.—Same as lode claims, except that the notice should state the number of acres or superficial feet claimed, instead of the length and course of the vein, and the width on either side thereof.[8]

Washington.—The notice must contain (*a*) the name of the claim; (*b*) name of location; (*c*) date of discovery and posting of notice, which shall be considered as the date of the location; (*d*) a description of the claim by reference to legal subdivisions of sections, if the location is made in conformity with the public surveys; otherwise, a description with reference to some natural object or permanent monument as will identify the claim.[9]

Wyoming.—Provisions are the same as in Colorado.[10]

§ 443. Preliminary development work required by state laws upon placer locations.—When speaking of the requirement of preliminary development work with respect to lode locations, we expressed the view that the object was twofold:—

(1) To determine the lode character of the deposit;

(2) To compel the discoverer to manifest his intention to claim the ground in good faith under the mining laws.[11]

It is quite obvious that both of these reasons cannot be offered in support of similar requirements in cases of placers, although the latter applies with equal force to them. Only five of the states, however, have attempted any legislation on this subject with respect to placers.

[8] Laws 1899, p. 69, § 2; Comp. Laws 1907, § 1496. *Ante*, § 380.

[9] Laws 1899, p. 71, as amended—Laws 1901, p. 292; Rem. & Bal. Codes 1909, § 7367.

[10] Laws 1888, pp. 89, 90, § 22; Rev. Stats. 1899, § 2553, as amended—Laws 1901, p. 104; Comp. Stats. 1910, § 3474.

[11] *Ante*, § 344.

In Idaho[12] it is provided that within fifteen days after making the location, the locator must make an excavation on the claim of not less than one hundred cubic feet, for the purpose of prospecting the same.

In Montana[13] the equivalent of the work done upon lode claims must be done upon placers.

Nevada[14] requires that within ninety days after posting the notice of location the locator shall perform not less than twenty dollars' worth of labor upon the claim for the development thereof.

In New Mexico, without prescribing any definite discovery work, the locator is required to make a bona fide discovery of the mineral or material claimed in the location notice within ninety days after location or the location will be void. Provided that in the case of oil or gas locations, the locator may have until the end of the succeeding calendar year in which to make a discovery.[15]

We have heretofore[16] discussed the force and effect of this statute.

In Washington[17] it is provided that within sixty days from the date of discovery, the discoverer shall perform labor upon the location or claim in developing the same to an amount equivalent in the aggregate to at least ten dollars' worth of such labor for each twenty acres or fractional part thereof contained in such location or claim. To which is added this language:—

12 Laws 1895, p. 25, § xii, as amended—Laws 1897, p. 12; Civ. Code 1901, § 2563; Rev. Code 1907, § 3222.

13 Rev. Code 1895, § 3611; Rev. Code 1907, § 2283. See Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153.

14 Comp. Laws 1900, § 221; Rev. Laws 1912, § 2435.

15 Laws 1909, p. 190.

16 *Ante*, § 437.

17 Laws 1899, p. 71, § 10, as amended—Laws 1901, p. 292; Rem. & Bal. Codes (1909), § 7367.

Provided, however, that nothing in this subdivision shall be held to apply to lands located under the laws of the United States as placer claims for the purpose of the development of petroleum and natural gas and other natural oil products.

The remaining states and territories have either passed no laws upon the subject or have repealed such as heretofore existed.

It must be remembered that these requirements are not necessarily connected with the annual labor prescribed by the acts of congress. While this preliminary development work might possibly under certain circumstances be considered in estimating the value of the annual labor for the first year next succeeding the date of location, its requirement is one of the acts of location, and we think such legislation is clearly within the power of the states.[18]

Article V. The Surface Covered by the Location—Its Form and Extent.

§ 447. Form and extent of placer locations prior to Revised Statutes.
§ 448. Form and extent under Revised Statutes.
§ 448a. Limitation as to size of claims under district rules.
§ 448b. Surface conflicts with prior locations.
§ 448c. Excessive placer locations.
§ 449. Placer locations by corporations.
§ 450. Locations by several persons in the interest of one—Number of locations by an individual.

§ 447. Form and extent of placer locations prior to Revised Statutes.—Previous to the act of July 9, 1870, commonly known as the "placer law," congress imposed no limitation to the area which might be included in the location of a placer claim. This, as well as every

[18] *Ante*, § 344.

other thing relating to the acquisition and continued possession of mining claims, was determined by rules and regulations established by miners themselves.[19] The size and shape varied according to the nature of the deposit, for in those days this class of claims embraced hydraulic "diggings," gulch or ravine claims, creek claims, and claims on bars and flats.[20] Locations of these claims were made without regard to the lines of public surveys, as there were none.

The placer law of 1870[21] provided for the patenting of placer claims under like circumstances and conditions as were provided by the lode law of 1866 for vein or lode claims. It was required, however, that where locations were made upon surveyed lands, the entry in its exterior limits was required to conform to the legal subdivisions of the public lands. For this purpose, it was provided that forty-acre tracts might be subdivided into areas of ten acres, but no location thereafter to be made was permitted to exceed one hundred and sixty acres for any one person or association of persons.

Locations made prior to this act might, if located in conformity with local rules, be patented, whatever their form or area,[22] and any number of contiguous claims, of any size, might be purchased, consolidated, and applied for as one entry.[23]

Under this act, any one person might, unless inhibited by local rules, locate one hundred and sixty acres. An association of persons was limited to a like area.

[19] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 649, 26 L. ed. 875, 11 Morr. Min. Rep. 673.

[20] Yale on Mining Claims and Water Rights, pp. 76, 77.

[21] 16 Stats. at Large, p. 217; Comp. Stats. 1901, p. 1432; 5 Fed. Stats. Ann. 42. See Appendix.

[22] Copp's Min. Dec. 40.

[23] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 651, 26 L. ed. 875, 11 Morr. Min. Rep. 673

The general mining act of May 10, 1872,[24] modified the original placer law by fixing the limit of twenty acres for each individual claimant. The limit which might be taken by an association of persons remained the same, as in this respect the act of 1870 was unrepealed.[25]

As to the form of the location, the later act provided that it should conform *as near as practicable* with the United States system of public land surveys and the rectangular subdivisions of such surveys; where it could not be conformed to legal subdivisions, it might be made the same as on unsurveyed lands. This was the state of the law when the federal statutes were revised.

§ 448. Form and extent under Revised Statutes.— The Revised Statutes, which embrace the laws of the United States general and permanent in their nature, in force on December 1, 1873, contain the following provisions as to form and extent of surface area:—

> § 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.
>
> § 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less

[24] 17 Stats. at Large, p. 91, § 10; Comp. Stats. 1901, p. 1425; 5 Fed. Stats. Ann. 13.

[25] *Ante*, § 72; St. Louis Smelting Co. v. Kemp, Fed. Cas. No. 12,239a, 21 Fed. Cas. 205.

than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person, or association of persons, which location shall conform to the United States surveys.

§ 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portions of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.

It will thus be observed:—

(1) That the unit or individual location is twenty acres;

(2) That not more than one hundred and sixty acres may be embraced within one location by an association of persons, of which there must be at least eight;[26]

(3) That the location, if upon surveyed lands, must conform as near as practicable to the lines of the public surveys.

[26] Kirk v. Meldrum, 28 Colo. 453, 65 Pac. 633, 636; Nome & Sinook Co. v. Snyder, 187 Fed. 385, 388; Hall v. McKinnon, 193 Fed. 572, 574.

(4) That a ten-acre tract is the smallest legal subdivision of the public lands recognized for placer location purposes.[27]

The smallest legal subdivision of the public surveys recognized by law under the congressional system regulating the disposal of lands other than mineral are quarter-quarter sections or forty-acre tracts, unless a fractional quarter is divided, as it is at times, into lots.[28]

The land department was called upon to consider an entry of a location described as the "W. one-half of lot 1." It was held:—

> In this case it is clear that as to the designated portions of lot 1 claimed under said entry, the same do not conform to the rectangular or legal subdivisions of the public land survey of the section or township in which said lot is situated. While said lot 1 is in itself a legal subdivision of said survey the department is not aware of any rule or provision of law whereby the subdivision of said lot into smaller legal subdivisions under the system of public land surveys may be recognized. It is therefore not only necessary that an official survey of the land located and claimed should be made as required for the purpose of proper description and identification in the patent, but such survey appears to be plainly demanded by the statute itself.[29]

As to whether it is practicable to make a location or survey conform to legal subdivisions is a matter which

[27] See Roman Placer M. Claim, 34 L. D. 260, where the locator attempted to subdivide into five-acre tracts. Under the coal land regulations, tracts containing two and one-half acres or multiple thereof may be acquired. Regulations, 41 L. D. 528.

[28] Hopper v. Nation, 78 Kan. 198, 96 Pac. 77, 78; Robinson v. Forrest, 29 Cal. 323.

[29] Holmes Placer, 29 L. D. 368; Chicago Placer M. Claim, 34 L. D. 9. See, also, Miller Placer, 30 L. D. 225; In re Knight, 30 L. D. 227; Mary Darling Placer, 31 L. D. 64.

rests entirely with the land department. The courts, however, are at times called upon to pass upon the question in controversies between individuals.[30] The land department has fluctuated between a strict and liberal interpretation of the law.

Commissioner McFarland held that the only construction of the language of the act, "as near as practicable," which is consistent with the context of the act and the general intention of congress is, that placer locations upon surveyed lands must conform to the public surveys in all cases, except where this is rendered impossible by the previous appropriation or reservation of a portion of the legal subdivision of ten acres upon which the claim is situated. The location in this case was made in 1880, and covered the bed of Bear river, in California, for twelve thousand feet, following the meanderings of the river, and embraced a small quantity of surface ground along its banks. The entry was held for cancellation.[31]

This ruling of the commissioner, however, was reversed by Secretary Teller,[32] who held that the placer law of 1870, which expressly required placer locations to conform to the lines of the public surveys, was unreasonable, a hardship, and in contravention of the established custom of the mining regions; therefore, it was modified by the act of May 10, 1872, so as to provide for exceptional cases where reason and common sense required a different regulation.

The case of the Bear river claim was of this exceptional character. The placer deposit was in a canyon on the banks of a very crooked stream, and where the

30 E. g., Mitchell v. Hutchinson, 142 Cal. 404, 76 Pac. 55, 56.

31 10 Copp's L. O. 3. See, also, Copp's Min. Lands, 115.

32 Rablin's Placer, 2 L. D. 764; Esperance M. Co., 10 Copp's L. O. 338.

adjoining lands were totally unfit for mining or agricultural purposes. The placer applicant was permitted to proceed to patent.

There can be no question but that this ruling is in harmony with the custom of miners in California. This particular river was, from 1852 to 1867, the scene of great mining activity, and for miles up and down the stream, during the season when the stage of the water would permit, miners claimed, occupied, and worked its bed, bars, and banks, under regulations defining the extent of their claims by a certain number of feet along the stream, and a width extending to the sides of the gulch. The supreme court of California in a comparatively recent period has recognized the right of a placer locator on surveyed lands to make a location in an irregular form and not conforming to the public surveys.[33]

These irregular claims on both surveyed and unsurveyed lands have been before the land department frequently in recent years, and in some instances they have been of such extensive length and disproportionately narrow width[34] as to invite caustic criticism on the part of the land department officials. We append an example:—

> Even if it were not a question of statutory requirement, the frequent fantastic outlines of numbers of placer locations which have, of late years, come to the attention of the department, would manifest the unwisdom of the recognition formerly accorded such nonconforming claims. With the gradual diminution of the public domain this question presents itself as one of increasing importance and the illegality of locations of such elongated narrow character often

[33] Mitchell v. Hutchinson, 142 Cal. 404, 76 Pac. 55, 56.

[34] In one case (unreported) the location was sixteen miles long and fifty-one feet wide, containing a little in excess of one hundred acres.

following the course of and embracing streams of water which the claimants seek to control is made more apparent.[35]

This language was used in considering the application of a placer claim more than one and one-half miles long with a width varying from two hundred and fifty to six hundred feet.

In the case of Snowflake Fraction Placer[36] the secretary of the interior reviewed all the previous decisions on the subject, and so far as we are advised the opinion in this case is the last published expression of the department.

The secretary states that the department would now be unwilling to approve such long and irregular shaped claims as had been previously allowed and patented. We extract the following from the opinion:—

> Whether placer claims conform sufficiently is a question of fact to be determined by the department. Each case must be decided on its own facts. It is the policy of the government to have entries, whether they be for agricultural or mining lands, in compact form. Congress has repeatedly announced this principle and the department has always and does now insist upon it. The public domain must not be cut into long and narrow strips. No shoestring claims should ever receive the sanction of the department.

The circuit court of appeals, ninth circuit, apparently concurs in this view.[37]

In the Snowflake case, however, the secretary makes two distinct departures from prior departmental rulings which deserve to be noted. It had been previously held that the fact that a placer claim was sur-

[35] Laughing Water Placer, 34 L. D. 56, 58.

[36] 37 L. D. 250.

[37] Hanson v. Craig, 170 Fed. 62, 65, 95 C. C. A. 338.

rounded by other locations furnished no excuse for nonconformity with the system of public surveys.[38]

This rule no longer obtains. A location may be made of vacant land surrounded by prior claims, and its boundaries may conform thereto regardless of the irregularity of form thus produced.

It had been previously ruled that—

> The mining laws contemplate that in all cases except in instances where impracticable to do so, placer mining claims must be made in conformity with the system of public land surveys, that is, rectangular in form and of dimensions corresponding to appropriate legal subdivisions and with east-and-west, and north-and-south boundary lines.[39]

This rule has been modified by the Snowflake case by waiving the requirement that the location should conform to the cardinal points.

Succinctly stated, the rules now followed by the land department are as follows:—

1. The location upon surveyed lands must conform to the subdivisions of the public surveys. Exception to this rule may be permitted where by reason of prior patents or other recognized segregations a tract of vacant land of irregular form is vacant and subject to appropriation; such irregular tract may be located conforming to the boundaries of the segregated tracts. It is possible that other deviations from the rule of conformity may be sanctioned, but the circumstances must be of such controlling force that it would be manifestly inequitable to refuse to recognize them. This is a question which must be determined as each

[38] Rialto No. 2 Placer Claims, 34 L. D. 44; Laughing Water Placer, 34 L. D. 56.

[39] Laughing Water Placer, 34 L. D. 56; Roman Placer, 34 L. D. 260.

case is presented, it being impossible to prescribe any definite rule, which should control all cases.

2. If on unsurveyed lands, the locations should be in square form, or at least rectangular.

> It is the view of this department that a claim hereafter located by one or two persons which can be entirely included within a square forty-acre tract, and a claim located by three or four persons which can be entirely included in two square forty-acre tracts, placed end to end and a claim located by five or six persons which can be entirely included in three square forty-acre tracts, and a claim located by seven or eight persons which can be entirely included in four square forty-acre tracts should be approved. In stating this rule, it is necessary to say that we do not intend that the forties which are made the unit of measure should necessarily have north-and-south and east-and-west boundary lines.[40]

The Snowflake case arose in Alaska, and it was in view of the conditions existing in that territory that the department felt called upon to review the entire subject and establish as near as it was possible to do so a general rule for the future guidance of locators.

The standard size of placer claims, as defined by the local rules in Alaska, is a parallelogram 1320x660 feet, which contains an area exactly of twenty acres, the equivalent of two ten-acre tracts in square form placed end to end, the direction conforming ordinarily to the course of the stream or stream-bed, upon or adjacent to which (bench claims) the locations are made. The courts have generally recognized the validity of these locations.

Under the act of congress passed August 1, 1912, the text of which will be found in section 450 of this trea-

[40] Snowflake Placer, 37 L. D. 250, 258.

tise, it is provided that no association placer claim thereafter located in Alaska shall exceed forty acres, and that no such claim shall be patented which is longer than three times its greatest width. This would prevent the patenting of a forty-acre association claim, or a consolidation of two individual claims which were located in the standard form now in vogue. Two twenty-acre tracts in this form, placed end to end, would form a parallelogram 2640x660 feet, or a length in excess of three times its width.

We think this act, however, allows a greater liberty as to form than that indicated by the ruling of the secretary in the Snowflake case. But the opinion of the secretary and the act of congress were manifestly framed for the purpose of discouraging a practice somewhat popular and limiting a privilege at times flagrantly abused, of making "shoestring" locations along the banks and including the water of running streams.

The later rulings of the department do not change the interpretation of the law. They simply express a policy which in the future will govern the land officers in passing upon each individual case as it is presented.[41]

A patent for a placer claim should describe with mathematical accuracy the land intended to be conveyed thereby, and where such a degree of accuracy cannot be obtained under an application that embraces land theretofore surveyed and returned in irregular subdivisions as "lots," an additional survey will be required.[42]

[41] For illustration of the manner of describing minor subdivisions located as placers, see Mining Circular, March 29, 1909, par. 24. See Appendix.

[42] Holmes Placer, 26 L. D. 650; Chicago Placer M. Claim, 34 L. D. 9.

Lands must be treated as unsurveyed until the plat is finally approved,[43] and filed in the local office.[44]

Sometimes part of a township has been surveyed, so that as a matter of calculation it is not difficult to determine the precise or proximate position of adjoining unsurveyed lands and the section number which would be given them when surveyed. The proximity of the unsurveyed to the surveyed lands has led to an error quite common of treating these unsurveyed lands as if the lines of the public surveys had been extended over them, and locating placer claims thereon by the government subdivision which the locator determines would be created when the system of surveys is extended over them. But such a description would not identify anything and would not satisfy the law.[45]

It may be practicable where discoveries are made in a region over which the public surveys have been partially extended to perfect by unofficial and private surveys the township and section lines, and in addition to a description by metes and bounds, which would certainly be necessary, there might be added a statement that the subdivision so located would, if the government surveys were extended, embrace such and such a tract, describing the probable result of the extension of such surveys. But this would be impracticable in most cases, and would entail an expense upon a placer locator not contemplated by the law and the results of

[43] Copp's Min. Dec. 41. *Ante*, §§ 104, 105, 142; Bullock v. Rouse, 81 Cal. 590, 595, 22 Pac. 919; Medley v. Robertson, 55 Cal. 396.

[44] In re Hyde & Co., 37 L. D. 164, and cases cited; Smith v. City of Los Angeles, 158 Cal. 702, 112 Pac. 307, 310.

[45] Terry v. Megerle, 24 Cal. 610, 625, 85 Am. Dec. 84; Barnard's Heirs v. Ashley's Heirs, 18 How. 43, 48, 15 L. ed. 285; Grogan v. Knight, 27 Cal. 516, 521; Robinson v. Forrest, 29 Cal. 318, 322; Middleton v. Low, 30 Cal. 596, 604; State v. Central Pac. R. R., 21 Nev. 94, 25 Pac. 442, 450; Bullock v. Rouse, 81 Cal. 590, 22 Pac. 919, 920.

which would in no sense be binding upon the government. In new regions over which the government has as yet established neither base nor meridian lines, as in Alaska, or in the unsurveyed public domain far removed from surveyed public lands, the method is not only impracticable but impossible.

§ 448a. Limitation as to size and form of claims under district rules.—During the period when placer mining claims were governed entirely by the local district regulations, the size and shape of the claims varied in different localities, based somewhat on the manner of occurrence of the deposits. Since the passage of the congressional laws on the subject there has been no attempt by state or territorial legislation to limit the size of claims to less than the unit of location sanctioned by the United States mining laws,—i. e., twenty acres.

As to the power of the local mining districts to provide for such limitation, there has been but little discussion by the courts.

The supreme court of Idaho expressed the view that such a rule or custom was reasonable and entirely in harmony with the spirit of the laws.[46]

The regulations of the land department for many years contained the following:—

> The foregoing provisions of the law are construed to mean that after the ninth day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location made by an individual can exceed twenty acres, and no location made by an association of individuals can exceed

[46] Rosenthal v. Ives, 2 Idaho, 244, 12 Pac. 904, 906, 15 Morr. Min. Rep. 324.

> one hundred and sixty acres, which location of one hundred and sixty acres cannot be made by a less number than eight *bona fide* locators; *and no local laws or mining regulations can restrict a placer location to less than twenty acres, although the locator is not compelled to take so much.*[47]

This was changed, however, by the adoption of later rules, which eliminated the last clause quoted above in italics.[48]

Whether this indicates a change of opinion on the part of the department as to the power of the local districts to place a limitation on the size of claims, or suggests that, in the judgment of the secretary, the subject was one not strictly within the scope of departmental regulations, or that the interpretation of the statute should not be prejudged by him until his jurisdiction in a contested case should be invoked, is difficult to determine.

The regulations of the Cape Nome mining district, Alaska, adopted October 15, 1898, provided that placer claims should be located thirteen hundred and twenty feet long by six hundred and sixty feet, making an area of twenty acres.

The validity of this regulation, so far as it prescribed the form of the location, was involved in a suit tried in the United States district court for the district of Alaska, second division.

The court held that—

> No miner's rule, regulation, or custom can limit him in the area or form of his claim, nor in its width or length; that any such rule, regulation, or custom

[47] Circular, Dec. 10, 1891, par. 61.

[48] Circular, Dec. 15, 1897, par. 35, 25 L. D. 573; Circular, June 24, 1899, par. 35, 28 L. D. 599; Circular, July 26, 1901, par. 29; Regulations, March 29, 1909, par. 29. See Appendix.

is void for conflict with both the spirit and the letter of the placer mining law.[49]

This case was taken to the circuit court of appeals and the judgment was affirmed, the court, however, holding that it was not necessary to pass upon this question.[50] As congress has passed an act governing placer locations in Alaska, and as the instance must be rare where mining locations are limited by local rules to an area less than twenty acres, the question is relatively unimportant.

§ 448b. Surface conflicts with prior locations.—The reasons assigned by the courts for permitting junior lode claimants to place the lines of their locations upon or across lands which have been previously appropriated, a matter fully discussed in preceding sections,[51] do not apply with equal force to placers. Yet the doctrine as to lode claims having been extended by the department so as to authorize the junior lode locator to so locate his claim across prior locations and patented surfaces as to divide the lode claim into noncontiguous tracts, the application of a similar doctrine in a modified form to placer claims was not unexpected. The practice at one time sanctioned by the department may be briefly summarized: A placer locator might locate a given subdivision of the public surveys not exceeding the statutory limit of twenty acres, and an association might locate not exceeding one hundred and sixty acres, and the location might properly describe the land located by the proper legal subdivision, although the tract so located embraced within its exterior limits prior segregated and patented lode claims,

49 Price v. McIntosh, 1 Alaska, 286, 300.

50 McIntosh v. Price, 121 Fed. 716, 718, 58 C. C. A. 136.

51 §§ 363, 363a.

thus dividing the placer claim into noncontiguous tracts. It was ruled that the patent when issued should describe the land by proper legal subdivisions, excepting, however, the tracts which have been previously segregated. In other words, the government night grant to the placer claimant the particular subdivision less what it had theretofore conveyed to others.[52]

This rule, however, was held to have no application to placer claims upon unsurveyed public lands.[53] The department had previously held that there is no authority for placing the lines of a placer location within, upon or across other claims embracing lands which have been patented or regularly entered under the public land laws.[54]

The present attitude of the department, however, as announced in the case of Snowflake placer,[55] discourages, if not inhibits, the laying of the lines of a placer claim over prior claims or other segregations. It now permits locations of irregular shape to be made conforming to boundaries of other claims which eliminates the necessity of making locations in rectangular form for the purpose of securing odd fractions not included in the boundaries of previous locations, a method which, as we have seen, at one time was not favored by the department.

The attitude of the courts on this subject, so far as they have expressed an opinion, is illustrated in the case of Stenfjeld v. Espe, decided by the circuit court of appeals, ninth circuit,[56] the facts of which are illus-

[52] In re Mary Darling, 31 L. D. 64; Rialto No. 2 Placer Mining Claims, 34 L. D. 44; Laughing Water Placer, 34 L. D. 56.

[53] Golden Chief A. Placer Claims, 35 L. D. 557.

[54] Grassy Gulch Placer, 30 L. D. 191.

[55] 37 L. D. 250.

[56] 171 Fed. 825, 828, 96 C. C. A. 497.

trated by a diagram, which we herewith reproduce as figure 41A.

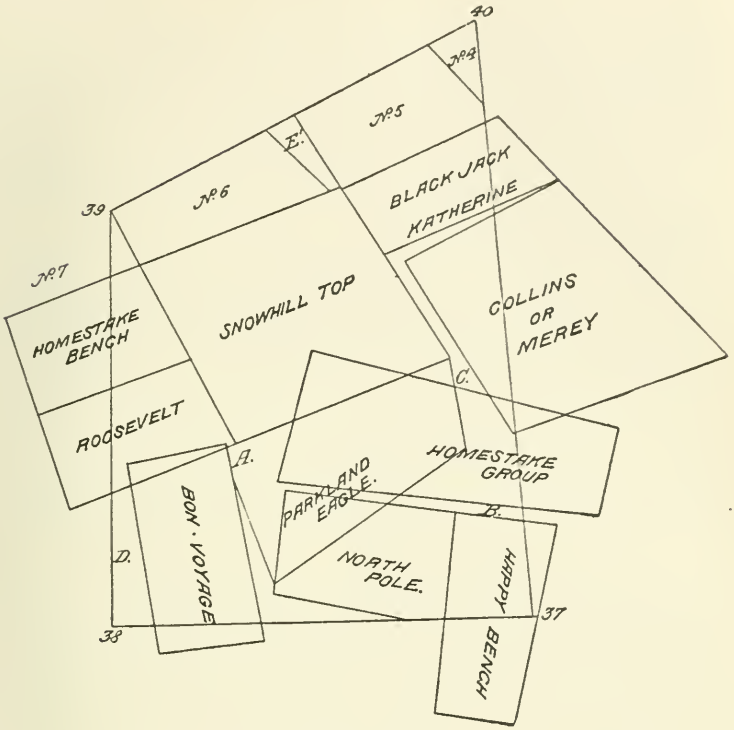


FIGURE 41A.

The Hercules No. 1 was an association claim covering an area of one hundred and seventy-nine acres. It was made for the avowed purpose of appropriating the noncontiguous fractions occurring between the boundary lines of previous locations. These fractions are lettered on the figure as A, B, C, D, E, the remaining area being covered by previously located placer claims.

The court, after reviewing the different rulings of the land department, decided that these fractions could not be appropriated in that manner, that the locators

of the Hercules should have made separate locations of the vacant tracts, and that no reason could be suggested for permitting a junior locator of a placer claim to lay his lines across a claim already located. The court pointed out the distinction between lode locations and placer claims, and held that the reasons which sanction the placing of lines of a lode location over those of a prior claim had no application to the location of placer claims.

The district court of appeals of California follows the rule sanctioned by the department as it stood prior to the decision in the Snowflake case, and as stated by the author in the second edition of this treatise.[57]

This ruling was announced prior to the decision of the circuit court of appeals, ninth circuit, mentioned above. The facts in the California case, however, may be differentiated from the federal case. In the former the location was upon surveyed land and there were no noncontiguous tracts involved. In the latter, the lands were unsurveyed and the tracts noncontiguous. In the California case the locator followed the then prevailing rule of the department as to the necessity for conforming to the lines of the public surveys, and would undoubtedly have received, and would now receive, a patent for the tract as located, excepting the previously patented land. His rights would not be prejudiced by the changed rulings.

§ 448c. **Excessive placer locations.**—The law contemplates that the location of placer claims shall ordinarily be made by legal subdivisions. When a location is made according to such subdivisions, no provision is made for surveying it again, for the evident reason that it is located as per survey that has already been

[57] Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931, 933.

made by the United States. The notice of location is a notice of its boundaries precisely as it would be in case of a homestead or pre-emption claim,[58] and there is but little opportunity for locators to include excessive area. It occasionally happens that by reason of segregation within a section, or by reason of irregularity in survey, tracts are platted as fractional lots, which at times are found to contain more than a regular subdivision. So that it may happen, for example, that a given quarter-section may contain more than one hundred and sixty acres. In certain classes of nonmineral entries the entryman would be permitted to take and pay for the excess. This is termed the rule of approximation. This rule, however, does not apply to mining locations. A surveyed subdivision containing one hundred and sixty-five acres would, if located by eight persons, be excessive, and the excess would have to be cast off by survey.[59]

Where the location is on unsurveyed lands, excesses may and frequently do occur. It is well settled that excessive locations are valid except as to the excess. As heretofore pointed out[60] in cases of lode locations of this character, the locator himself by the calls for distance from his discovery point furnishes a guide for casting off the excess. But with placers there is no such guide. If within the boundaries as staked there is an excessive area, there is ordinarily no data in the posted or recorded notice which would enable a subsequent locator to determine the precise position of the excess.

58 Kern Oil Co. v. Crawford, 143 Cal. 298, 76 Pac. 1111, 1113.

59 Chicago Placer Mining Claim, 34 L. D. 9. If, however, the excess should be negligible, the locations would be permitted. Eight Oil Co., unreported.

60 *Ante*, § 362.

Most of these excessive placer locations have occurred in Alaska over which the public surveys have not as yet been extended and the discussion of the method of casting off excess is found in the decisions of the federal courts.

In McIntosh v. Price[61] the circuit court of appeals, ninth circuit, after reiterating the legal principle that locations of this character were only void as to the excess, announced the rule that owners having located in good faith, being in possession and working the claim, could not be deprived of the right to select the portion of the claim they would elect to hold by an adverse entry of another party seeking to locate a portion of the same ground, and that this right of selection could be exercised within a reasonable time after the original locator had been notified or had knowledge that his location as marked on the ground was excessive. This rule is fully recognized in subsequent cases.[62] An adverse locator attempting to relocate any part of such claim is a trespasser and his location is a nullity.[63]

§ 449. Placer locations by corporations.—As heretofore noted,[64] the supreme court of the United States has determined that a domestic corporation formed under the laws of a state may locate public mineral lands, but intimates that there may be some question raised as to the extent of a claim which a corporation may be permitted to locate as an original discoverer,

61 121 Fed. 716, 719, 58 C. C. A. 136.

62 Zimmerman v. Funchion, 161 Fed. 859, 860, 36 C. C. A. 53, 1 Water & Min. Cas. 437; Waskey v. Hammer, 170 Fed. 31, 34, 95 C. C. A. 305; Jones v. Wild Goose M. & T. Co., 177 Fed. 95, 98, 29 L. R. A., N. S., 392, 101 C. C. A. 349.

63 Jones v. Wild Goose M. & T. Co., 177 Fed. 95, 98, 29 L. R. A., N. S., 392, 101 C. C. A. 349.

64 *Ante*, § 226.

suggesting that it might perhaps be treated as one person and entitled to locate only to the extent permitted a single individual.[65]

The placer law quoted in a preceding section[66] permits an "association of persons" to locate not to exceed one hundred and sixty acres. A corporation is an association of persons; at the same time we must admit that it is but an artificial person.

In the case of United States v. Trinidad Coal Company,[67] the supreme court of the United States said that—

> The words "association of persons" are often and not inaptly employed to describe a corporation. An incorporated company is an association of individuals acting as a single person and by their corporate name.

This case involved the validity of patents issued on coal land entries, the action having been brought by the government to vacate them on the ground of fraud. The coal land laws[68] give to an individual the right to enter one hundred and sixty acres and to an association of persons three hundred and twenty acres. The court held that the purpose of the government would be defeated altogether, if it should be held that corporations were not "associations of persons" within the meaning of the statute and subject to its restrictions. We do not think this case, however, can be applied by analogy to the placer mining laws, so as to establish the rule that a corporation as an association

[65] McKinley v. Wheeler, 130 U. S. 630, 636, 9 Sup. Ct. Rep. 638, 32 L. ed. 1048, 16 Morr. Min. Rep. 65.

[66] *Ante*, § 448.

[67] 137 U. S. 160, 169, 11 Sup. Ct. Rep. 57, 34 L. ed. 640.

[68] Rev. Stats., § 2347; 17 Stats. at Large, 607; Comp. Stats. 1901, p. 1440; 5 Fed. Stats. Ann. 55.

of persons may locate one hundred and sixty acres of placer land.

The land department has held that—

> The reasonable conclusion is that within the legislative contemplation whenever a corporation locates a lode or placer claim under the mining laws, it does so in its strictly corporate capacity and that it is with respect to it as a corporate entity, rather than in the collective capacity of the stockholders that the provisions of those laws should be applied.[69]

In other words, a placer location made by a corporation cannot exceed twenty acres. The corporation occupies the status of an individual.

This ruling has been followed uniformly by the department.[70]

Inferentially, at least, the rule finds support in the decision by United States Circuit Judge Ross in Gird v. California Oil Company.[71] We think in practice that the rule as stated by the land department is now generally accepted throughout the mining regions.

Locations made by a number of persons in the interest of a corporation or of a single individual are discussed in the next section.

§ 450. Locations by several persons in the interest of one—Number of locations by an individual.—It is a matter of frequent occurrence that an individual locator, desiring to obtain more ground than he is permitted under the law to appropriate in his individual capacity by a single location, resorts to the use of "dummies," and perfects locations in their names, sub-

69 Igo Bridge Extension Placer, 38 L. D. 281.

70 Bakersfield Fuel & Oil Co., 39 L. D. 460; Coalinga Hub Oil Co., 40 L. D. 401.

71 60 Fed. 531, 545.

sequently obtaining conveyances thereof. The courts have held that this is a fraud upon the government.[72]

> The policy of the government in disposing of the mineral lands as well as other portions of the public domain is to make a general distribution among as large a number as possible of those who wish to acquire such land for their own use rather than to favor a few individuals who might wish to acquire princely fortunes by securing large tracts of such lands, and it is contrary to this policy and to the provisions of sections twenty-three hundred and thirty and twenty-three hundred and thirty-one of the Revised Statutes for one person to cover more than twenty acres of placer ground by one location by the device of using the name of his employees and friends as locators.[73]

The privilege given by congress to an association of persons consisting of not more than eight individuals to locate one hundred and sixty acres, or twenty acres for each associate not exceeding eight, would seem to contemplate the *bona fide* association together of two or more individuals by mutual agreement and express consent, or a subsequent ratification of locations made by one for the benefit of the others. The practice has been common for individual prospectors or promoters to use names either without prior authority or with the express understanding that the parties whose names are thus used are to convey to the prospector or promoter. In many instances the same group of

[72] Mitchell v. Cline, 84 Cal. 409, 24 Pac. 164, 166; Gird v. California Oil Co., 60 Fed. 531, 538; Cook v. Klonos, 164 Fed. 529, 537, 90 C. C. A. 403; Nome & Sinook Co. v. Snyder, 187 Fed. 385, 388, 109 C. C. A. 217, 1 Water & Min. Cas. 202; Coalinga Hub Oil Co., 40 L. D. 401. See, also, Riverside Sand & Cement Co. v. Hardwick, 16 N. M. 479, 120 Pac. 323, distinguishing the California cases *supra*. Also Borgwardt v. McKittrick Oil Co. (Cal.), 130 Pac. 417, 419.

[73] Durant v. Corbin, 94 Fed. 382, 20 Morr. Min. Rep. 84.

names is thus used for a large number of locations in the same locality, thus facilitating the absorption by one individual of large areas of the public mineral domain in contravention of the spirit of the mining laws.

With the exception of salines and placer claims in the territory of Alaska, where there is now by congressional act, to be hereafter noted, a limitation upon the number of placer claims which an individual or an association may locate, it is well settled that both an individual and a *bona fide* association of persons may locate as many claims as they desire. There is no restriction as to number of locations, lode[74] or placer.[75] Nor is there any inhibition against the consolidation by conveyance of any number of claims which may have been located in good faith by either individuals or associations, particularly after all the acts of location have been completed, to a single individual or a corporation. What the law prohibits is the scheme or device entered into by which an individual or a corporation is to acquire directly or indirectly for his or its own individual benefit more than the amount or proportion in area which he or it might lawfully acquire under the law.[76]

The discovery of oil in Central California furnished an inviting field for the multiplication of association claims, most of them made without previous discovery and many of them undoubtedly through the use of "dummies." They were subsequently, however, conveyed to purchasers in good faith for value and with-

[74] *Ante*, § 361.

[75] Riverside Sand & Cement Co. v. Hardwick, 16 N. M. 479, 120 Pac. 323, 324.

[76] Nome & Sinook Mining Company v. Snyder, 187 Fed. 385, 388, 109 C. C. A. 217, 1 Water & Min. Cas. 202; Cook v. Klonos, 164 Fed. 529, 537, 90 C. C. A. 403; United States v. Trinidad Coal Company, 137 U. S. 160, 169, 11 Sup. Ct. Rep. 57, 34 L. ed. 640.

out notice, who developed the ground at large expense and made the requisite discoveries. In the patent proceedings in such cases, the land department has not undertaken to criticise the locations when they are thus obviously held by *bona fide* grantees in possession and working. The department decided, however, that when such conveyance was made prior to discovery, the individual or corporate grantee in making discovery was limited to a single twenty-acre tract. We have heretofore observed that congress intervened and overruled the departmental decisions by legislative enactment.[77] This action of congress was undoubtedly in a large degree induced through the recognition of the equities in favor of the ultimate grantee who developed the ground. The location notice contains no evidence of fraud, and the legal presumption would be in favor of its validity.

In the second edition of this treatise, the author stated the rule to be that the alleged fraudulent character of this class of locations was a question which the government alone could inquire into, and the supreme court of New Mexico accepted this as a correct statement of the law.[78]

The question can undoubtedly be raised in the patent proceeding[79] and in an adverse suit arising out of such proceeding,[80] as this action is in aid of the patent proceeding and the question, like that of citizenship, is one in which the government is interested. The court action is in the nature of "inquest of office."[81]

[77] *Ante*, § 438b.

[78] Riverside Sand & Cement Mfg. Co. v. Hardwick, 16 N. M. 479, 120 Pac. 323, 325.

[79] Coalinga Hub Oil Co., 40 L. D. 401.

[80] Durant v. Corbin, 94 Fed. 382, 383, 20 Morr. Min. Rep. 84; Gird v. California Oil Co., 60 Fed. 531, 545.

[81] *Ante*, §§ 233, 234.

But the circuit court of appeals of the ninth circuit decided that the question can be litigated in a controversy between individuals in an action in equity to quiet title. In Cook v. Klonos[82] the court held that as the case was not one involving the right of an individual to purchase and hold a number of claims, but was a fraudulent attempt of an individual to acquire indirectly by location more placer ground than the law sanctioned, the location was void. All the locators had knowledge of the transaction, and the parties did not come into court "with clean hands."

On rehearing the court modified its opinion, having, after re-examination of the case, reached the conclusion that two of the locators were not parties to the fraud, and permitted these two to select twenty acres each out of the association claim of one hundred and sixty acres.[83]

In the case of Nome & Sinook Co. v. Snyder[84] an adverse suit arising out of the patent proceeding, the court followed the rule announced in the Cook-Klonos case, and held the location there involved was void and that the ground remained vacant mineral land subject to location by others.

Where an association of persons locating mining claims formed a corporation to which the title was transferred, the locators receiving stock in the proportion of respective interest in the location, the location was valid. None of the locators were dummies.[84a]

We think a review of these cases authorizes the following deductions:—

[82] 164 Fed. 529, 539, 90 C. C. A. 403.

[83] Cook v. Klonos, 168 Fed. 700, 701, 94 C. C. A. 144. See, also, Rooney v. Barnette, 200 Fed. 700, 705, where this principle was recognized.

[84] 187 Fed. 385, 388, 109 C. C. A. 217, 1 Water & Min. Cas. 202.

[84a] Borgwardt v. McKittrick Oil Co. (Cal.), 130 Pac. 417, 419.

1. In the patent proceeding, in adverse suits arising out of it and in actions which may be brought directly by the government, the question of the fraudulent character of the locations may be investigated and determined.

2. In controversies between private individuals in suits other than adverses arising out of the patent proceeding, the question may be investigated and determined where the original parties to the fraud or persons having notice are before the court.

3. The question is not an issuable one in ordinary actions between individuals where the claimant, deraigning title from the alleged fraudulent locators, is a *bona fide* grantee for value and without notice.

As heretofore noted[85] congress on August 1, 1912, passed an act entitled "An act to modify and amend the mining laws in their application to the territory of Alaska and for other purposes,"[85a] which act, among other things, limited an association placer to forty acres, and made the following provisions limiting the number of claims which an individual or association might locate:—

> That no person shall hereafter locate any placer mining claim in Alaska as attorney for another unless he is duly authorized thereto by power of attorney in writing. . . . .
>
> Any person so authorized may locate placer mining claims for not more than two individuals or one association under such power of attorney but no such agent or attorney shall be authorized or permitted to locate more than two placer mining claims for any one principal or association during any calendar month and no placer mining claim shall hereafter be located in Alaska except under the limitations of this

[85] *Ante*, § 448.

[85a] 37 Stats. at Large, 242.

act. No person shall hereafter locate or procure to be located for himself more than two placer mining claims in any calendar month: *Provided* that one or both such locations may be included in an association claim. Any placer claim attempted to be located in violation of the act shall be null and void and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made.

The act has no retroactive effect. It is prospective only in its operation.[85b]

During the period when rights were governed exclusively by local rules, in certain districts the number of claims which one might locate and hold at one time within that particular district were defined. But with the exception of the Alaska statute above referred to, the law governing the location of salines [86] and the laws applicable to the Philippine Islands,[87] there is no trace of this found in the legislation of congress.

The amended rules and regulations adopted by the miners at Cape Nome in June, 1901, provided that—

Not more than one placer claim can be located in said district in the name of the same person on the same stream, creek or gulch.

Many of the districts of Alaska had similar rules. The validity of these limitations has been doubted, but not judicially determined.[88]

[85b] For instructions interpreting this act, see 41 L. D. 347. Also see Appendix.

[86] *Post*, § 514a.

[87] Ante, § 361, note.

[88] The state of Oregon has a law limiting the discoverer of a vein to two claims; all others to one claim on the same vein. Annot. Laws of Oregon (1892), § 3829; Ballinger's Code, § 3974; Lord's Or. Laws, § 5127.

Article VI. The Marking of the Location on the Ground.

§ 454. Rule as to marking boundaries of placer claims in absence of state legislation.
§ 455. State legislation as to marking boundaries of placer claims.
§ 456. Same—First group.
§ 457. Same—Second group.
§ 458. Same—Third group.

§ 454. Rule as to marking boundaries of placer claims in absence of state legislation.—We have explained in a previous section the necessity for, and object of, marking lode locations upon the ground.[89]

As will appear in the next section, most of the states have enacted statutes providing for marking placer locations on the ground, whether on surveyed or unsurveyed lands. Some of them provide that where the location is on surveyed lands and conforms to the subdivision of the public surveys, no further marking is necessary. We are presently dealing with the necessity for marking this class of locations on the ground in the absence of any state legislation supplementing the federal laws. The Revised Statutes of the United States[90] provide that "the location must be distinctly *marked upon the ground*, so that its boundaries can be readily traced." As to lode claims, this is held to be mandatory, and after the discovery the most important act in the series necessary to perfect a valid location.[91]

The necessity for marking placer claims on the ground, located on surveyed lands, which claims are irregular in shape and not conforming to the subdivi-

[89] *Ante*, § 371.

[90] § 2324; 17 Stats. at Large, 92; Comp. Stats. 1901, p. 1426; 5 Fed. Stats. Ann. 19.

[91] *Ante*, § 361.

sions of the public surveys, and a like necessity for marking all placer claims on unsurveyed lands, is conceded by practically all the courts. The difference of opinion existing between the courts, to be hereafter analyzed, arises out of the inquiry whether in locating a placer mining claim by legal subdivisions on surveyed lands it is necessary to mark the location on the ground so that the boundaries can be readily traced, or is the description in the posted and recorded notice of the subdivisions located a sufficient "marking" within the meaning of the federal law.

Even if the language of the Revised Statutes above quoted was by reason of its place in the context applicable only to lode claims, a subsequent section places placers in the same category.

> Claims usually called "placers" . . . . shall be subject to entry and patent, under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims, but when the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.[92]

As was said by the supreme court of the United States:—

> The purpose of this section is apparently to place the *location* of placer claims on an equality both in procedure and rights with lode claims.[93]

To arrive at an understanding of the present state of the law as interpreted in the different jurisdictions it is expedient to deal with decisions chronologically.

[92] Rev. Stats., § 2329; 16 Stats. at Large, 217; Comp. Stats. 1901, p. 1432; 5 Fed. Stats. Ann. 42.

[93] Clipper M. & L. Co. v. Eli M. & L. Co., 194 U. S. 220, 227, 24 Sup. Ct. Rep. 632, 48 L. ed. 944. Italics are ours.

The supreme court of Colorado in the case of Sweet v. Webber (1884),[94] ruled that marking on the ground was just as necessary under the federal law in case of placers as in case of lodes. The location involved in this case was made prior to the enactment of any legislation in Colorado on the subject. The opinion does not distinctly state that the location was made by government subdivisions on surveyed lands. But that is the inference, and an inspection of the record discloses it to be the fact.[94a]

In the California case of White v. Lee[95] the question was squarely presented, the locations being coextensive with a government subdivision on surveyed lands. Defendant had previously located the ground by posting and recording the notice but failed to mark the boundaries. Plaintiff's grantors relocated the ground, marked off the boundaries, and did all that the law required to perfect the location. The case turned on the sole question of the validity of the prior unmarked location. The contention was made in support of its validity that the last clause of section 2329 of the Revised Statutes, "when lands have been previously surveyed by the United States the entry in its exterior limits shall conform to the legal subdivisions of the public lands," dispensed with the necessity for marking on the ground. As to this contention, the supreme court of California said:—

> This [clause of the statute], however, simply provides where the claimant shall run the lines of his claim. It does not at all dispense with the require-

[94] 7 Colo. 443, 4 Pac. 752.

[94a] We are indebted to Messrs. Morrison & De Soto for the information that the locations involved in this case were on surveyed lands. The record was examined by them for the purpose of ascertaining this fact.

[95] 78 Cal. 593, 596, 12 Am. St. Rep. 115, 21 Pac. 363.

ment as to how the lines of the claims shall be evidenced. Section 2331 [of the Revised Statutes] provides that "where placer claims are upon surveyed lands and conform to legal subdivisions, no further survey or plat may be required." This provision does not refer to the marking by claimant of the boundaries of his claim upon the ground, but to the plat and survey which are to be filed upon application for the patent. Nor do we see any provision which dispenses with the general requirement that the boundaries shall be marked.

The controlling *ratio decedendi* is, however, found in the following expressions in the opinion:—

The construction contended for does not seem to us to be in harmony with the general purpose of the act. The purpose of the requirement, that the claimant shall mark the boundaries of his claim is to inform other miners as to what portion of the ground is already occupied. The men for whose information the boundaries are required to be marked, wander over the mountains with a very small outfit. They do not take surveyors with them to ascertain where the section lines run, and ordinarily it would do them no good to be informed that a quarter-section of a particular number had been taken up. They would derive no more information from it than they would from a description by metes and bounds, such as would be sufficient in a deed. For the information of these men, it is required that the boundaries shall be "distinctly marked upon the ground." The section lines may not have been "distinctly" marked upon the ground, or the marks may have become obliterated by time or accident. And to say, that the mere reference to the legal subdivision is of itself sufficient, would, in our opinion, defeat the purpose of the requirement.

The doctrine of White v. Lee was followed in the parallel case of Anthony v. Jillson (1890),[96] the location being by government subdivision without any marking. The court ruled that "the failure to mark the boundaries is fatal to the validity of the claim." In the case of Temescal Oil Co. v. Salcido (Aug. 1902),[97] the location was made upon surveyed lands and the notice described the tract by government subdivisions. The locator had the claim carefully surveyed by a competent surveyor. One of the original monuments placed at the northwest corner of the tract by the government surveyors was found in place. The lines of the location were run and stakes two or three inches in diameter and standing a foot above the ground were placed at each corner. The court ruled as follows:—

> We think this inclosure shows a substantial compliance with the provisions of the United States statutes requiring that "the location must be distinctly marked on the ground so that its boundaries can be readily traced." We are influenced somewhat in our consideration of the point by the fact that the notice of location which was posted and recorded described the claim by its government subdivision, the land having already been surveyed by the government; and that a government monument was still in place at the time of the location. There is nothing in White v. Lee, 78 Cal. 593, 12 Am. St. Rep. 115, 21 Pac. 363, inconsistent with this conclusion, for in that case no attempt of any kind had been made to monument the claim, but the claimant relied solely on the government survey as sufficient to mark the boundaries of his claim.

[96] 83 Cal. 296, 23 Pac. 419, 420, 16 Morr. Min. Rep. 26.

[97] 137 Cal. 211, 69 Pac. 1010.

In this case it is clearly conceded that some kind of physical marking was necessary. If the court erred at all, it was in determining that the marking was sufficient to identify the claim taken in connection with the notice. The court followed without citing, however, the ruling of the supreme court of the United States in McKinley Mining Co. v. Alaska Mining Co. (Jan. 1902),[98] upholding the validity of a location on unsurveyed lands when there was only one monument and that a stump, but distances and width were given in the notice from which the court held the boundaries of the claim could be readily traced.

The case of Kern Oil Co. v. Crawford (1903)[99] arose out of the following state of facts: A location of one hundred and sixty acres of placer ground on surveyed lands was made by an association of persons. It conformed to, and the location notices described, the tract by the government subdivision. The four corners were marked by 4x4 stakes painted white and appropriately scribed. The eastern boundary was further marked by lathes set at intermediate points between the two corner stakes.

It was subsequently discovered that in retracing the lines the surveyor made a mistake in the position of the northeast and southeast corners, so that a small sliver seventy-three feet wide on the north boundary and twenty-four feet wide at the south boundary was not included within the lines connecting the boundaries as marked upon the ground. The facts are shown on

[98] 183 U. S. 563, 570, 22 Sup. Ct. Rep. 84, 46 L. ed. 331.

[99] 143 Cal. 298, 76 Pac. 1111, 1113.

the following figure (41B), the etched portion indicating the excluded ground. The struggle was over

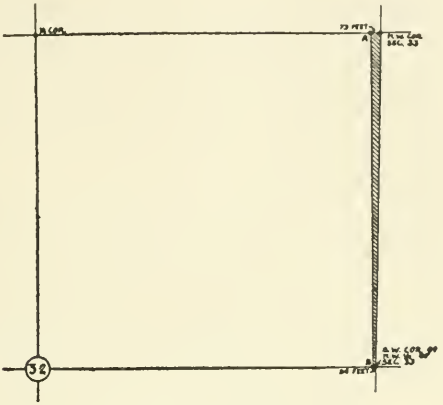


FIGURE 41B.

this sliver. Oil having been found in paying quantities in another portion of the quarter-section, the strip between the staked and true boundaries was sufficient upon which to sink a well, and it was relocated on the theory that the first locators could not claim anything east of their marked boundaries. The court, in determining this case, in order to defeat the relocation, felt constrained to directly overrule the decision in White v. Lee, to discredit Anthony v. Jillson, and explain Temescal Oil Co. v. Salcido, and in reversing its position gave the following reasons:—

> When a location is made according to legal subdivisions, no provision is made for surveying it again, for the evident reason that it sold as per the survey that has already been made by the United States. The statute expressly provides that in such a case no further plat or survey shall be required. The purchaser takes it to the extent of its exterior boundaries precisely as it would be in case of a homestead

or pre-emption claim. There is no reason why the locator should be required to stake out and mark its boundaries, nor does the statute require it. They have already been staked and marked and cannot be changed. Any person seeing the notice could by employing a surveyor or otherwise find the boundaries as easily as could the locator and it evidently is the duty of such person to do so in case he is interested in knowing where they are.

With a profound respect for the court which rendered this decision, we deferentially insist that the opinion *ex visceribus suis* discloses the *non sequitur* of its reasoning and the fallacy of its conclusions. In the absence of any state legislation, or local rule, no notice need be either posted[100] or recorded.[1] The federal laws are to be construed in the light of this contingency. This case fortuitously involved a location of a full quarter-section, three corners of which were supposed to have been originally marked by quarter-section corner posts by the government surveyor. Suppose, however, the location had been so situated as not to reach any of the exterior boundaries of the section or any of the originally marked corners. Lines of these minor subdivisions are not surveyed in the field, but are protracted in the surveyor-general's office and the lines are wholly imaginary.[2] Where such a minor subdivision is located and not marked, what evidence is there on the ground or elsewhere of any appropriation which will warn off subsequent intending locators if there are no marks to indicate it?

It is possible that in the case of normal quarter-sections, monuments originally placed by the government are, or some of these are, extant, making a retracing of

100 *Ante*, § 350.
1 *Ante*, § 273.
2 *Ante*, § 106.

the boundaries a comparatively easy matter. But experience shows that this marking is frequently obliterated, and it is rarely that any of the exterior stakes of a quarter section are found in place. One of the most difficult tasks the surveyor has is in retracing old government surveys. Many times the nearest recognized extant monument or government corner is miles distant. The length of tie lines in patent surveys of lode claims affords abundant proof of this.

In the case now being considered, the surveyor in retracing the lines of a single quarter-section missed the correct position of two of the corners.

How could a later prospector, unskilled in the science of surveying, be expected to find them? Furthermore, in order to determine the invalidity of the relocation of the sliver on the east boundary, it was entirely unnecessary to overrule the doctrine of the previous cases. The placing of three corner monuments, which were conceded to be in their proper position, was in connection with the notice sufficient to support the validity of the original location, and disclose the apparent innocent mistake made by the locator in marking the east boundary. Ample justification for such a ruling could have been found in Temescal Oil Co. v. Salcido and McKinley Min. Co. v. Alaska Min. Co., *supra*, without disturbing the rule announced in White v. Lee.

The supreme court of Colorado makes the following comment on the decision in Kern Oil Co. v. Crawford, after quoting approvingly the excerpt from White v. Lee, *supra*:—

> It is proper to state that the decision in the case of White v. Lee, *supra*, was expressly overruled in the case of Kern Oil Co. v. Crawford, *supra*, but a careful examination of the opinion in the latter case shows conclusively that the question determined in

the former case was not before the court in the latter one. The ruling on that point was a gratuity and unnecessary to a determination of the matters then before the court. In any event the reasons given in White v. Lee for requiring staking under the federal statute are logical and persuasive and their force remains unimpaired.[3]

While the expressions of the supreme court of Colorado coincide with the author's views, candor compels us to admit that the question was not involved in the case under consideration and that the language used was possibly as gratuitous and unnecessary as was that employed in the Kern Oil Co. v. Crawford case. The court itself says that they were not called upon to decide the question here discussed.

The supreme court of Arkansas, in Worthen v. Sidway (1904),[4] approves and follows the rule in White v. Lee. It does not refer to the decision in Kern Oil Co. v. Crawford, probably for the reason that it had not then been published. However, later cases in Arkansas follow Worthen v. Sidway without referring in any way to Kern Oil Co. v. Crawford.[5] The supreme court of Montana, in Freezer v. Sweeney (1889),[6] stated that there was no requirement of the federal law that placer locations should be staked or marked on the ground, and that the provision as to marking applied only to lode claims. This is obviously an error. The statement in any event is too sweeping. The court at that time, however, would undoubtedly have held that locations on surveyed lands conforming to government subdivisions need not be marked. The question, however,

3 Saxton v. Perry (1910), 47 Colo. 263, 107 Pac. 281, 285.

4 72 Ark. 215, 79 S. W. 777, 780.

5 Malececk v. Tinsley (1905), 73 Ark. 610, 85 S. W. 81; Ware v. White (1907), 81 Ark. 220, 108 S. W. 831, 832.

6 8 Mont. 508, 21 Pac. 20, 21.

was not involved and the expression employed *arguendo* is mere *dictum*.

The case of McDonald v. Montana Wood Co. (1894),[7] decided by the supreme court of Montana, has been at times cited as supporting the doctrine of Kern Oil Co. v. Crawford. But an examination of the opinion in that case shows that the question here discussed was not involved. An association claim of one hundred and sixty acres had been made and the location had been distinctly marked on the ground. The contention was made that each of the component twenty-acre units should have been separately marked. The contention was overruled. It may be here appropriately noted that Montana now has, and for years has had, a statute which requires the marking of all placer claims. This statute will be referred to in the next section.

The land department follows, without citing any authorities, the later California rule announced in Kern Oil Co. v. Crawford, *supra*. The secretary of the interior says:—

> It does not, in my judgment, mean that when the placer is located on surveyed lands it is necessary to mark the boundaries. There is no purpose that can be subserved by so doing. The public surveys are as permanent and fixed as anything can be in that line, and any fractional part of a section can be readily found, and its boundaries ascertained, by that method, for all time to come, and is necessarily more stable and enduring than marking it by perishable or destructible stakes or monuments.[8]

Mr. Morrison states that the question has been the subject of curious judicial rulings and advises staking

[7] 14 Mont. 88, 43 Am. St. Rep. 616, 35 Pac. 668.

[8] Reins v. Murray (1896), 22 L. D. 409. See par. 30, Regulations, March 29, 1909, Appendix.

de novo as the only safe course.[9] Mr. Costigan, referring to the decision in Kern Oil Co. v. Crawford, says:—

> But it cannot be that the supreme court of the United States will adhere to a rule so inconsistent with the object of notice to prospectors which is a basic principle of the mining law.[10]

It will be borne in mind that the question is, so far as the supreme court of the United States is concerned, *res integra.* When that tribunal is called upon to decide it, we are of the opinion that when it analyzes the different conflicting decisions and by a process of common factoring eliminates the speculative opinions, *dicta,* and gratuitous and unnecessary recitals *arguendo,* and separates the cases in which there was some degree of marking and the question was simply the sufficiency of such marking, from those where there was no marking on the ground whatever, it will rest its final judgment on the *ratio decedendi* of the case of White v. Lee, the first and, in our judgment, the best expression of opinion by the supreme court of California on the subject. The question is not and in its nature cannot be one of expediency, nor is it one which justifies the application of the equitable rule of "balancing inconveniences."

We have discussed this question at length for the reason that its proper solution involves the validity of certain state legislation on the subject which is to be discussed in the following section.

§ 455. State legislation as to marking boundaries of placer claims.—There is no legislation on the subject of marking placer locations in Arkansas, Oregon, North Dakota, or South Dakota. These states with

[9] Morrison's Mining Rights, 13th ed., p. 218; 14th ed., p. 251.

[10] Costigan on Mining Law, pp. 255, 256.

the territory of Alaska are, in this behalf, governed entirely by the federal law, which, as we have heretofore observed, requires a marking on the ground so that the boundaries may be readily traced. The extent of such marking is a question to be determined in each case, with due regard to circumstances and environment. The rule adopted by the supreme court in McKinley Creek Min. Co. v. Alaska Min. Co.,[11] where one fixed monument with a posted notice giving directions, distance and dimensions, was held a sufficient marking, furnishes a guide which is barely within the limits of safety.

The remaining states divide themselves into three groups. First: Those wherein the laws distinctly and in terms provide that there shall be a marking on the ground whether the location is on surveyed or unsurveyed lands. Second: Those which provide generally for the manner of marking the locations, without expressly making any distinction between claims located on surveyed and those on unsurveyed lands. Third: The states which expressly provide that where the location is upon surveyed lands and is located by government subdivisions either no marking or staking is required, or provision is made for monumenting only at one point. These groups may be separately considered.

§ 456. **Same—First group.**—Two states fall within this group,—New Mexico and Washington.

In New Mexico it is required that at the time of making the location, a notice must be placed at a designated corner stating the name of the claim, the purpose and kind of material for which such claim is located, and if located on surveyed lands, the notice

11 183 U. S. 563, 570, 22 Sup. Ct. Rep. 84, 46 L. ed. 331.

shall contain a description of such claim by metes and bounds with reference to some known object or monument. And whether upon surveyed or unsurveyed lands, each corner of such claim shall be marked by a wooden post at least four feet high, securely set in the ground, or by a substantial stone monument.[12]

Washington has a statute similar to that of New Mexico, although the manner of marking is not specified. Where the claim is upon surveyed lands, it must, notwithstanding that fact, be marked upon the ground the same as other locations. The marking must be done within thirty days after the date of the discovery.[13]

The laws of these two states are in full harmony with the spirit and intent of the federal law. There can be no question about their validity.[14] A substantial compliance therewith is necessary to the perfection of a placer location.[15]

§ 457. Same — Second Group.—Five states fall within this group,—Colorado, Arizona, Idaho, Montana, Utah, and Wyoming. No distinction is expressly made between locations on surveyed and those on unsurveyed lands. All locations are required to be marked on the ground.

Colorado requires the boundaries to be marked prior to recording the certificate of location (thirty days from discovery) by placing a substantial post at each angle of the claim.[16]

12 Laws 1909, p. 190.

13 Laws 1901, p. 292; Bal. Supp. 1901–3, § 3151a; Rem. & Bal. Codes 1909, § 7367.

14 See Saxton v. Perry, 47 Colo. 263, 107 Pac. 281, 283.

15 *Ante*, § 250 (8).

16 Mills' Annot. Stats., § 3136; Rev. Stats. 1908, § 4205.

Arizona requires the marking of boundaries by a post or monument of stones at each angle of the claim located. When a post is used, it must be at least four inches square by four feet six inches in length, set one foot in the ground, and surrounded by a mound of stone or earth. If, on account of a bed of rock or precipitous ground, it is impracticable to sink such posts, they may be placed in piles of stones. When a mound of stones is used, it must be at least three feet in height and four feet in diameter at the base. If for any reason it is impossible to erect and maintain either a post or monument of stone at any angle of the claim, a witness post or monument may be used, and must be placed as near the true corner as the nature of the ground will permit.[17]

Idaho,[18] Montana,[19] and Utah[20] require the same marking as in case of lode claims.

Wyoming requires surface boundaries to be designated before recording the certificate of location (ninety days from discovery) by substantial posts or stone monuments at each corner of the claim.[21]

This class of statutes is subject to no criticism. It has been contended that under the federal law, where a location of placer ground has been made upon surveyed lands conforming to legal subdivisions, no marking was necessary, and that state legislation which required marking in a particular manner was repug-

17 Rev. Stats. 1901, §§ 3242, 3243.

18 Laws 1895, p. 25, § 12, as amended—Laws 1897, p. 12; Civ. Code 1901, § 2563; Rev. Code 1907, § 3522; Lode Claims, *ante*, § 374.

19 Rev. Code 1895, § 3611; Rev. Code 1907, § 2283; Lode Claims, *ante*, § 374.

20 Laws 1899, p. 26, § 3; Comp. Laws 1907, § 1497; Lode Claims, *ante*, § 374.

21 Laws 1888, pp. 88, 90, § 22; Rev. Stats. 1899, § 2553, as amended —Laws 1901, p. 104; Comp. Stats. 1910, § 3474.

nant to the federal law, and, therefore, void. The contention, however, was overruled, and legislation of this character held valid and mandatory.[22]

§ 458. **Same—Third group.**—Nevada and California are in this group. The laws of Nevada provide as to the manner of locating placer claims as follows: The location must be made

> by posting thereon upon a tree, rock in place, stone, post or monument a notice of location containing the name of the claim, name of the locator or locators, date of location, and number of feet or acres claimed and by marking the boundaries and the location point in the same manner and by the same means as required by the laws of this state for the marking of the boundaries of lode claim locations; provided, that when the United States survey has been extended over the land embraced in the location the claim may be taken by legal subdivisions and except the marking of the location point as hereinbefore prescribed no other markings than those of said survey shall be required.[23]

This statute is somewhat ambiguous. Obviously, the location point which is to be marked is not required to be at a corner of the claim. It may be anywhere within the location. There is no initial point from which a subsequent locator may retrace the lines of the original survey. The burden is upon him to discover the boundaries of the located tract without any starting point. The description of the government subdivision furnishes no evidence of its position on the ground. The statute possibly contemplated that the boundaries had been actually surveyed and monu-

22 Saxton v. Perry, 47 Colo. 263, 107 Pac. 281, 283.

23 As amended, Stats. 1899, p. 94; Comp. Laws 1900, § 220; Rev. Laws 1912, § 2434.

mented and that the markings were still on the ground, in which event the purpose of the law might be satisfied, as the second locator could find the monuments and together with the notice ascertain the *situs* of what was located. California has a statute somewhat similar, it provides that—

> Where the United States survey has been extended over the land embraced in the location, the claim may be taken by legal subdivisions and no other reference than those of said survey shall be required, and the boundaries of a claim so located and described need not be staked or monumented. The description by legal subdivisions shall be deemed the equivalent of marking.[24]

This act was undoubtedly based upon the ruling of the supreme court of California in the case of Kern Oil Co. v. Crawford, discussed in a previous section.[24a]

If the federal laws require this class of locations to be marked on the ground so that the boundaries can be readily traced, no state has the power to dispense with this requirement, or in terms or inferentially to provide that a mere reference in a notice to a government subdivision shall be the equivalent of a physical marking.

From the extended discussion and authorities cited in section 454 of this treatise, we incline to the opinion that both of these statutes contravene the letter and spirit of the federal law, and are void. In any event, a locator availing himself of the privilege of locating without marking runs a serious risk of jeopardizing

[24] Civ. Code, § 1426c.

[24a] The author confesses that he was *particeps criminis* in the passage of this law. It was submitted to and recommended by him, as it was in line with the latest expression by the supreme court of the state. No consideration, however, was at that time given to the question here discussed, nor were the cases analyzed until this portion of the treatise was rewritten for the third edition.

what may prove to be valuable property. The better and safer course to pursue is to at least set monuments and stakes at each corner of the claim.

Article VII. The Location Certificate and Its Record.

§ 459. State legislation concerning location certificates and their record.
§ 460. Amendment of placer locations.

§ 459. State legislation concerning location certificates and their record.—As in the case of lodes, certificates of location[25] and their record[26] are the subject of state or local regulation. Where such certificates are required, and their record is provided for, the same general rules apply as in the case of lodes. Where a record is made necessary, the requirements of the federal law as to contents of such record are mandatory.[27] There are no specific provisions on the subject in either Utah, South Dakota, North Dakota or Oregon. It is possible that in North Dakota and South Dakota the laws governing lode claims may be construed to cover placers, but it is extremely doubtful if such is the case. Other states make special provision for this class of cases.

Arizona.—Within sixty days after the date of location, the locator must record a copy of the location notice as posted.[28]

California.—Within thirty days after the posting of the notice of location of a placer claim, a true copy thereof must be recorded in the office of the county recorder of the county in which the claim is situated.[29]

[25] *Ante*, § 379.
[26] *Ante*, §§ 273, 328.
[27] *Ante*, § 273.
[28] Rev. Stats. 1901, § 3244; contents of location notice, *ante*, § 442.
[29] Civ. Code, § 1426d.

Colorado.—Within thirty days from the discovery a certificate of location must be recorded in the county recorder's office, which must contain: (1) the name of the claim, designating it as a placer; (2) name of locator; (3) date of location; (4) number of acres or feet claimed; (5) description of claim by reference to natural objects or permanent monuments.[30]

Idaho.—Within thirty days from the time of location the locator must file for record, in the district in which the same is situated, or in the office of the county recorder, a substantial copy of his notice of location, which must contain: (1) date of location; (2) name of locator; (3) name and dimensions of the claim; (4) the mining district (if any) and county in which the same is situated; (5) the distance and direction of the post on which the notice is posted from such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself the location of the claim. An affidavit of one of the locators must be attached.[31]

Montana.—The requirements in Montana are substantially the same as in case of lode locations,[32] substituting the number of superficial feet or acres claimed in place of the number of linear feet and surface area embracing the lode, and the location thereon of the discovery shaft, cut or tunnel.[33]

Nevada.—The contents of the certificate of location are the same as those required in Colorado, with the addition of (6) the kind and amount of work done by

30 Mills' Annot. Stats., § 3136; Rev. Stats. 1908, § 4205.

31 Laws 1895, p. 25, §§ 12, 13, as amended—Laws 1897, p. 12; Civ. Code 1901, § 2563; Rev. Code 1907, § 3222.

32 *Ante*, § 380, p. 493.

33 Rev. Code 1895, § 3612; as amended—1901, p. 140; 1907, p. 18; Rev. Code 1907, § 2284.

him, and the place on the claim where said work was done.[34]

New Mexico.—A duplicate of the location notice must be filed and recorded in the office of the probate clerk of the county wherein the land located is situated within ninety days after such location is made and such notice posted on the claim.[35]

Utah.—Within thirty days from the date of posting the notice of location a substantial copy thereof must be filed for record in the office of the county recorder, or of the mining district recorder, if there be one.[36]

Washington.—Within thirty days from date of discovery, the notice of location must be recorded in the office of the auditor of the county in which the discovery was made.[37]

Wyoming.—Within ninety days after the date of discovery the location certificate must be recorded with the county clerk and *ex-officio* register of deeds. The certificate must contain: (1) the name of the claim, designating it as a placer; (2) the name of the locator; (3) date of location; (4) number of feet or acres claimed; (5) a description of the claim by designation of such natural or fixed objects as shall identify the claim beyond question.[38]

Alaska.—The recording of mining claims in Alaska is regulated by acts of congress. Within ninety days from the discovery of the claim notices of location

[34] Comp. Laws 1900, § 221; Rev. Laws 1912, § 2435.

[35] Laws 1909, p. 191. Contents of location notice, *ante*, § 442.

[36] Laws 1899, p. 26, § 4; Comp. Laws 1907, § 1498; amended 1909, p. 79. Contents of location notice, *ante*, § 442.

[37] Laws 1899, p. 71, as amended—Laws 1901, p. 292; Rem. & Bal. Codes 1909, § 7367. Contents of location notice, *ante*, § 442.

[38] Laws 1888, pp. 89, 90, § 22; Rev. Stats. 1899, § 2553, as amended —Laws 1901, p. 104; Comp. Stats. 1910, § 3474.

must be recorded in the recording district in which the property is situated. If not within any established recording district the notice should be recorded in the office of the clerk of the division having supervision over the recording division.[39]

Arkansas.—Mining claim notices are to be recorded in the recorder's office of the *ex-officio* recorders in the different counties of the state. No time limit is fixed.[40]

§ 460. Amendment to placer locations.—For the purpose of curing imperfections in the original location, correcting errors or supplying omissions, the same latitude of amendment should be allowed as in the case of lode locations. This privilege may be exercised by either the original locators or their grantees. Obviously, where the original location embraced the maximum limit under the law, additional territory may not be secured by an amended location.[41]

An individual owner of two or more contiguous placer mining claims, having acquired the title to both, could not amend so as to make one location out of the two.[42]

A location once made based upon a discovery within its limits cannot be amended so as to include an added area in the possession of another.[43]

This would seem obvious, as such an attempted location would be a trespass upon a possession acquired by an intervening locator.

We are of the opinion, however, that where a locator or an association of persons locates an area less than

39 Alaska Codes, p. 7; Carter's Ann. Codes, p. 137.
40 Acts 1899, p. 113; amended Digest of Statutes, 1904, § 5360.
41 Garden Gulch Placer Claim, 38 L. D. 28; In re Head, 40 L. D. 135.
42 Garden Gulch Placer Claim, 38 L. D. 28; In re Head, 40 L. D. 135.
43 Biglow v. Conradt, 159 Fed. 868, 870, 47 C. C. A. 48.

the maximum allowed by law, an amendment may be made so as to include contiguous territory, provided the location as amended does not exceed the statutory limit, the added area is subject to appropriation and discovery is made in the added area.[43a]

Article VIII. Conclusion.

§ 463. General principles announced in previous chapter on lode locations apply with equal force to placers.

§ 463. General principles announced in previous chapter on lode locations apply with equal force to placers.—The architecture of existing mining legislation is a composite of incongruous elements—an aggregation of piecework, which does not present, in outline, that symmetrical form or structure which commends itself to the professional eye. There is a total lack of harmonious blending, and it is often difficult to determine what provisions of the law apply distinctively to lode locations, and what to placers; or what, in contemplation of law, is to be applied to both.

The laws governing both classes had a common origin, and during the period when local rules and customs held sway the only differences between them were as to the extent of property rights enjoyed, and such as were made necessary by the difference in the form in which the deposits occurred. But discovery and appropriation were the sources of the miner's title, and continuous development the condition of its perpetuation in the case of both lodes and placers. Congress manifestly recognized these as the basis of its mining legislation, and as a rule the courts have applied the

[43a] As to necessity for discovery in added area, see Phillips v. Brill, 17 Wyo. 26, 95 Pac. 856, 859.

general underlying principles applicable to one class of locations to the other, so far as the nature of the deposits would permit.

The previous chapter on the subject of lode locations, dealing with the location and its requirements, the discovery, the manner of locating, the marking of the boundaries, the changing of these boundaries, and amendment of location certificates, the relocation of forfeited or abandoned claims, applies in the main to placers, except so far as the nature of placer deposits obviously demands a discrimination. There is no extralateral right attached to a placer claim pure and simple. Therefore, the laws as they are construed by the courts, with reference to end and side lines and the pursuit of veins beyond vertical planes drawn through surface boundaries, have no reference to placers.

For the purpose of systematic treatment, owing to certain peculiar attributes pertaining to lode locations, it was necessary to consider the two classes and their mode of appropriation separately. But there are many things in common between them, as we think will be readily observed by a consideration of this and the two preceding chapters.

CHAPTER IV.

TUNNEL CLAIMS.

ARTICLE I. INTRODUCTORY.
II. MANNER OF PERFECTING TUNNEL LOCATIONS.
III. RIGHTS ACCRUING TO THE TUNNEL PROPRIETOR BY VIRTUE OF HIS TUNNEL LOCATION.

ARTICLE I. INTRODUCTORY.

§ 467. Tunnel locations prior to the enactment of federal laws.
§ 468. The provisions of the federal law.

§ 467. Tunnel locations prior to the enactment of federal laws.—Tunnel locations, or, as they are sometimes called, "tunnel-sites," occupy a unique position in practical mining upon the public domain. They were not unknown during the period antedating the enactment of congressional mining laws. The discovery of a new mineral belt frequently gave birth to local rules upon the subject of tunnels, and it was by no means an uncommon occurrence for tunnel locations to be made on the four slopes of a mountain, their projected lines running into the hill from every conceivable point of the compass, and at different elevations above the mountain's base, from one hundred to several thousand feet. The practical development of the mines was, as a rule, from surface discoveries on the crest of the mountain, or its benches and sloping ridges. Strife or litigation between surface locators and tunnel proprietors rarely, if ever, arose, for the simple reason that, according to the popular view, priority of discovery, whether from the surface or in the tunnel, established a priority right. In many localities, the life of the camp was short, and

most of the tunnel projects began and ended with the staking of a line, the incorporation of a company with a fabulous capital, and the tunnel bore barely entering under cover.

We think it may be fairly stated that prior to any legislation upon the subject by congress, in popular estimation, the purpose of a tunnel location was that of discovery of blind veins, or deposits, whose existence it might be difficult, if not impossible, to establish by surface exploration, and that such discovery, by means of the tunnel, should be treated as the equivalent of one made from the surface. As to questions of priority, it was a mere race of diligence. Rights upon the discovered lode dated from the discovery in the tunnel, and not from the date of the tunnel location. Surface prospecting within the vicinity of the projected tunnel line was not inhibited. It is possible that the chances of a successful discovery in some formations were in favor of the tunnel method and this may have been the inducement for projecting it, but the tunnel locator's privilege was not understood to be an exclusive one within any defined surface area. We do not assert that this was the universal rule, or that it was of such general observance as to lead to the inference that congress had it in mind when it legislated upon the subject. We do not know that to have been the fact. We have strong convictions upon the subject, but it would be difficult to assert that in construing congressional legislation, as we are about to do, these antecedent conditions, popular theories, and local experiences should, or could, legally be resorted to as an aid to interpretation.

Dr. R. W. Raymond, while acting as the government's special commissioner for the collection of min-

ing statistics in the states and territories west of the Rocky Mountains, refers to the "tunnel fever" which flourished in Clear Creek county, Colorado, and other outlying districts in that state, and presented some views on the subject which in the light of subsequent experiences are quite prophetic.[1]

In an able article contributed to the "Mineral Industry,"[2] the same gentleman reviews the history of tunnel legislation and comments in an interesting and logical way upon some of the vices and inherent defects in the legislation, as well as upon some of the embarrassments surrounding the practical application of the law in the light of its more modern interpretation by the courts.

In construing the first mining laws of congress, which were but the crystallization of the miners' rules and customs theretofore in force, the courts had for their guide many adjudications made during the earlier history of mining in the west, enabling them to catch the spirit of these local regulations and interpret the federal law in the light of such precedents. But as to rights flowing from tunnel locations, there were practically no judicial precedents. The "tunnel fever" broke out after the passage of the act of 1866, but too near the passage of the act of 1872 to give opportunity for judicial interpretation. The tunnel laws now under consideration were incorporated in the act of May 10, 1872, and in construing them the courts have been compelled practically to break new ground. The net results thus far reached will be explained and illustrated in the succeeding sections.

1 "Mineral Resources West of the Rocky Mountains" (1871), p. 322.
2 Vol. vi, p. 681 (1897).

§ 468. The provisions of the federal law.—We are not at present concerned with the act of congress of February 11, 1875,[3] providing that development work performed in running a tunnel shall be estimated as work done upon the lodes with like effect as if done from the surface. This act has no particular bearing upon the subject now under consideration. We are now called upon to construe section four of the act of May 10, 1872, which is embodied in the Revised Statutes, and is as follows:—

> § 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes, within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes, not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

Concerning this legislation, Dr. Raymond very appropriately remarks:—

> This is the only provision of the Revised Statutes concerning tunnel rights. Perhaps it is fortunate that there are no more. Certainly this one is ambiguous and perplexing enough, and additional ones of the same character would have made confusion worse confounded. . . . .

[3] 18 Stats. at Large, p. 315; Comp. Stats. 1901, p. 1427; 5 Fed. Stats. Ann. 21.

As an amendment to the act of 1866, it is, taken by itself, simple and clear enough, though perhaps not wise. As a part of the act of 1872, it is inconsistent, incomplete, and mischievous.[4]

These caustic epigrams express the situation, but afford no substantial aid in the interpretation of the law. They suggest difficulties almost insurmountable, but give no light upon the rule of construction.

Article II. Manner of Perfecting Tunnel Location.

§ 472. Acts to be performed in acquiring tunnel rights.
§ 472a. State legislation regulating tunnel locations.
§ 473. "Line" of tunnel defined.
§ 474. "Face" of tunnel defined.
§ 475. The marking of the tunnel location on the ground.

§ 472. Acts to be performed in acquiring tunnel rights.—The statute is silent as to the manner in which a tunnel location is to be perfected. It is not a mining claim, although it has sometimes been inaccurately called one. It is simply a means of exploration.[5] This subject is left to miners' customs and state statutes.[6] It is also to some extent at least regulated by rules prescribed by the commissioner of the general land office, under the direction of the secretary of the interior, the authority for such regulation being found in the provisions of the Revised Statutes.[7] These rules, prescribed in pursuance of

[4] Monograph, "Tunnel Rights under the United States Mining Law," Mineral Industry, vol. vi, p. 680.

[5] Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 355, 357, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

[6] Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 355, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

[7] § 2478; Comp. Stats. 1901, p. 1586; 6 Fed. Stats. Ann. 529.

such authority, become a mass of that body of public records, of which the courts take judicial notice,[8] and when not repugnant to the acts of congress have the force and effect of laws.[9]

By these rules[10] the tunnel locator is required, as soon as his projected tunnel enters cover, to give notice by erecting a substantial board or monument at the "face," or point of commencement thereof, upon which must be posted a good and sufficient notice, containing:—

(1) The names of the parties or company claiming the tunnel right;

(2) The actual or proposed course or direction of the tunnel;

(3) The height and width thereof;

(4) The course and distance from such face or point of commencement to some permanent well-known objects in the vicinity, by which to fix and determine the *locus*, as in case of lode claims.

The "boundary *lines*" thereof are to be established by stakes and monuments along such lines, at proper

[8] Caha v. United States, 152 U. S. 211, 217, 14 Sup. Ct. Rep. 513, 38 L. ed. 415; Whitney v. Spratt, 25 Wash. 62, 87 Am. St. Rep. 732, 64 Pac. 919; Van Gesner v. United States, 153 Fed. 46, 52, 82 C. C. A. 480; United States v. McClure, 174 Fed. 510, 511; Leonard v. Lennox, 181 Fed. 760, 764, 104 C. C. A. 296.

[9] Poppe v. Athearn, 42 Cal. 607, 609; Rose v. Nevada & G. V. Wood & Lumber Co., 73 Cal. 385, 15 Pac. 19, 20; Chapman v. Quinn, 56 Cal. 266, 273; United States v. Mackintosh, 85 Fed. 333, 337, 29 C. C. A. 176; Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, 21 Morr. Min. Rep. 633; S. C., on appeal, 190 U. S. 301, 23 Sup. Ct. Rep. 692, 24 Sup. Ct. Rep. 860, 47 L. ed. 1064. And see Orchard v. Alexander, 157 U. S. 372, 383, 15 Sup. Ct. Rep. 635, 39 L. ed. 741; Germania Iron Co. v. James, 89 Fed. 811, 815, 32 C. C. A. 348; James v. Germania Iron Co., 107 Fed. 597, 600, 46 C. C. A. 476; Van Gesner v. United States, 153 Fed. 46, 82 C. C. A. 180.

[10] See Mining Regulations, July 26, 1901, March 29, 1909, pars. 16–18. See Appendix.

intervals, to the terminus of the three thousand feet from the "face," or point of commencement.

At the time of posting the notice and marking out the lines, a full and correct copy of such notice, defining the tunnel claim, must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case, stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon, the extent of work performed, and that it is their *bona fide* intention to prosecute work on the tunnel so located and described, with reasonable diligence. As to what *lines* are to be marked, we shall consider in a subsequent section.

§ 472a. State legislation regulating tunnel locations.—But three states have any legislation on this subject. California provides for a location notice to be posted at the face or point of commencement, which must contain the name of the locator, date of location, the proposed course or direction of the tunnel, and a description with reference to natural objects or permanent monuments. The boundary lines of the tunnel shall be established by stakes or monuments placed along the lines at intervals of not more than six hundred feet. The notice must be recorded within thirty days after posting.[11]

Colorado simply provides that the locator shall record the location, specifying the place of commencement and termination thereof, with the names of the parties interested therein.[12]

[11] Civ. Code, secs. 1426e–1426g.

[12] Mills' Annot. Stats. § 3140; Gen. Stats. 1883, p. 720; Rev. Stats. 1908, § 4207.

Nevada has a statute similar to California, providing, however, that the notice shall also define the height and width of the tunnel. The boundary lines are to be marked by stakes at intervals of not more than three hundred feet. The location notice must be recorded with both the mining district and county recorders.[13]

The statute further provides that all veins or lodes discovered in the tunnel must be located at the surface, the same as other lode claims.[14]

These provisions of the laws of Nevada relating to tunnels are embodied in a general statute, covering all classes of locations, which contains a section which provides that the act shall be construed as equally applicable to all classes of location, except when the requirements as to any one class is manifestly inapplicable to any other class or classes.[15]

The provisions of these various statutes will be noted when and if they become important in the discussion which follows.

§ 473. "Line" of tunnel defined.—The tunnel proprietor is accorded by the statute the right of possession of all veins or lodes within three thousand feet from the face of the tunnel on the *line* thereof, not previously known to exist, discovered in such tunnel; and locations on the *line* of such tunnel of veins or lodes not appearing at the surface, made by other parties after the commencement of the tunnel and while the same is being prosecuted with reasonable diligence, shall be invalid. The word "line" appears in no other connection in the statute. As we shall hereafter note, the

[13] Comp. Laws 1900, §§ 226–228; Rev. Laws 1912, §§ 2440–2442.
[14] Comp. Laws 1900, § 229; Rev. Laws 1912, § 2443.
[15] Comp. Laws 1900, § 230; Rev. Laws 1912, § 2444.

statute is silent as to the manner of marking the tunnel location on the ground. The character of this marking is defined in the regulations adopted by the secretary of the interior, and in two of the states, California and Nevada, by statutes, the state legislation not, however, differing essentially from the departmental regulations. These regulations require that the *boundary lines* of the tunnel shall be marked by stakes or monuments placed along such lines at proper intervals to the terminus of the three thousand feet from the face or point of commencement of the tunnel, "and the *lines* so marked will define and govern as to specific boundaries within which prospecting for lodes not previously known to exist is prohibited."[16]

We have therefore to consider the phrase "*line of the tunnel*" in two aspects,—the *line* that is to be marked on the surface, and the *lines* which define boundaries within which prospecting at the surface by third parties is practically inhibited. The natural assumption would be that stated in the regulations,—the *lines* to be marked on the surface means the *lines* within which prospecting is prohibited. But on this subject there seems to be some confusion of thought observable in the decisions.

So far as the land department is concerned, we find the following views to have been expressed:—

In the case of Corning Tunnel M. & R. Co. v. Pell,[17] the commissioner of the general land office held that the line of the tunnel named in the statute was the width of the tunnel bore (six feet) and three thousand feet long, not a rectangular parallelogram, three thousand feet square or three thousand feet by fifteen hundred feet.

[16] Regulations Land Department, par. 18. See Appendix.

[17] 3 Copp's L. O. 130, 131.

All of its rulings on this point have been to the same effect. According to the interpretation by the department, prospecting at the surface was only inhibited within these narrow limits.[18]

This view was fully approved by the supreme courts of Colorado[19] and Montana,[20] and inferentially upheld by the supreme court of Idaho.[21]

The circuit court of appeals for the eighth circuit, while, as we shall hereafter note, determining that the area within which prospecting is inhibited is the rectangular parallelogram three thousand feet square, refers to the discovery on the *line* of the tunnel as necessarily indicating the width and course of the bore.[22]

But there was no attempt to judicially define what was meant by the lines of the tunnel which are required to be marked by departmental regulations. Our deductions as to the required marking will be found in a subsequent section.[23]

§ 474. "Face" of tunnel defined.—The land department construes the term "face of such tunnel," as used in the Revised Statutes, to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this

[18] In re David Hunter, 5 Copp's L. O. 130; In re John Hunter, Copp's Min. Lands, 222; In re J. B. Chaffee, Copp's U. S. Min. Dec. 144.

[19] Corning Tunnel Co. v. Pell, 4 Colo. 508, 511, 14 Morr. Min. Rep. 612.

[20] Hope M. Co. v. Brown, 7 Mont. 550, 557, 19 Pac. 218, 220; Id., 11 Mont. 370, 379, 28 Pac. 732, 733.

[21] Back v. Sierra Nev. Cons. M. Co., 2 Idaho, 386, 17 Pac. 83, 85.

[22] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. 200, 211, 13 C. C. A. 390.

[23] *Post*, § 475.

point that the three thousand feet are to be measured. There is no room for dispute as to this.[24]

While it is true that in the conduct of active mining operations, as work advances the face of the drift or tunnel recedes farther into the hill, and its *locus* is constantly changed, yet the word as used in the tunnel law can mean but the one thing and that is the first full exposure of height and width after entering under cover. It was manifestly intended that the length of the open surface approach to where the tunnel enters cover was not to be considered in estimating the three thousand feet, and for that reason the term "face" was used.

§ 475. The marking of the tunnel location on the ground.—In marking the tunnel location on the surface it has been the custom to mark it by two parallel lines of stakes defining the width of the tunnel bore and following the course of the projected tunnel to the length of three thousand feet. This was the construction placed by the land department upon the phrase "line of the tunnel" employed in the statute, and was the marking contemplated by the departmental regulations.[25]

Strictly speaking, for the purpose of marking, this is the line of the tunnel. At the same time it is now well settled that such marking does not define the area within which prospecting at the surface is inhibited.[26]

Logically, the marking of the tunnel location should be effected by marking the exterior boundaries of the parallelogram, within the area of which prospecting is not permitted, or, rather, permitted at the peril of the

[24] See monograph by Dr. Raymond entitled "Tunnel Rights Under the United States Mining Laws," Min. Ind., vol. vi, pp. 681, 686.

[25] *Ante*, § 473.

[26] *Post*, § 489.

prospector. As a matter of caution, the line and width of the projected tunnel bore, as well as the exterior boundaries of the parallelogram, should be marked at the surface.

Article III. Rights Accruing to the Tunnel Proprietor by Virtue of His Tunnel Location.

§ 479. Important questions suggested by the tunnel law.
§ 480. Rule of interpretation applied.
§ 481. Length upon the discovered lode awarded to the tunnel discoverer.
§ 482. Necessity for appropriation of discovered lode by surface location.
§ 483. To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with reasonable diligence operate as a withdrawal of the surface from exploration by others?
§ 484. The Colorado rule.
§ 485. The Montana rule.
§ 486. The Idaho rule.
§ 487. Judge Hallett's views.
§ 488. The doctrine announced by the circuit court of appeals, eighth circuit.
§ 489. Tunnel locations before the supreme court of the United States.
§ 490. Opinions of the land department.
§ 490a. Rights of junior tunnel locator as against senior mining claims on the line of the tunnel.
§ 491. Inquiries suggested in the light of rules thus far enunciated by the supreme court of the United States as to the extent of the rights of a tunnel locator on a vein discovered in the tunnel.

§ 479. Important questions suggested by the tunnel law.—The provisions of the law upon the subject of tunnel locations present for consideration several important questions, the solution of which has engaged the attention of the courts, both state and federal. The inquiries suggested may be thus formulated:—

(1) What are the rights accruing to the tunnel proprietor by virtue of a discovery made in the tunnel,

in the absence of conflicting rights acquired by surface discovery?

(2) To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with diligence operate as a withdrawal of the surface from exploration by others?

(3) What rights, if any, are secured by a junior tunnel locator as against senior mining locations which are covered by the line of the tunnel bore?

Some incidental questions necessarily arise, the correct solution of which depends upon reaching a satisfactory conclusion, by way of answers, to one or the other of the foregoing inquiries.

§ 480. Rule of interpretation applied.—It is an elementary rule in the interpretation of laws that a given statute should be construed in connection with all other statutes which are essentially *in pari materia.*[27]

In applying this doctrine to the tunnel laws, and attempting a construction which would be in harmony with the entire body of the mining law, the courts, state and federal, have encountered serious difficulties, and have reached results which practically place locations on lodes discovered in a tunnel located under the tunnel laws in a distinct category by themselves, leaving still open for discussion many important questions which will have to be adjusted without regard to the main body of the mining laws. This will be made manifest as we outline the state of the law as announced by the courts.

[27] Pennington v. Coxe, 2 Cranch, 33, 2 L. ed. 199; Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782; Platt v. Union Pac. R. R., 99 U. S. 48, 59, 25 L. ed. 424; Kohlsaat v. Murphy, 96 U. S. 153, 160, 24 L. ed. 844; Heydenfeldt v. Daney G. & S. M. Co., 93 U. S. 634, 638; Neal v. Clark, 95 U. S. 704, 708, 24 L. ed. 586.

§ 431. **Length upon the discovered lode awarded to the tunnel discoverer.**—Section twenty-three hundred and twenty of the Revised Statutes provides that a mining location based upon a surface discovery may equal, but shall not exceed, fifteen hundred feet in length.

As to the length on the discovered lode to which the tunnel discoverer is entitled, Judge Hallett was of the opinion that it was not fixed by the act of congress, but was left to local regulation, and that, in the absence of such regulation, nothing would pass but the line of the tunnel.[28]

Prior to the passage of the congressional law, a state statute was in existence in Colorado,[29] fixing the length at two hundred and fifty feet each way from the tunnel, and Judge Hallett held this statute to be controlling after the enactment of the federal law. The supreme court of the United States has incidentally stated that such was the rule, but the case then under consideration arose out of a location made in 1865, at a time when the state statute was undoubtedly controlling.[30]

The supreme court of Colorado has determined that this state law was not in force after the passage of the congressional law,[31] and that a discovery in the tunnel entitled the discoverer to fifteen hundred feet in length on the lode, under the provisions of section twenty-three hundred and twenty of the Revised Statutes,[32]

28 Rico-Aspen Cons. M. Co. v. Enterprise M. Co., 53 Fed. 321, 324.

29 Mills' Annot. Stats., § 3141 (repealed).

30 Glacier Mt. S. M. Co. v. Willis, 127 U. S. 471, 481, 8 Sup. Ct. Rep. 1214, 32 L. ed. 172.

31 Followed in Enterprise M. Co. v. Rico-Aspen M. Co., 167 U. S. 108, 114, 17 Sup. Ct. Rep. 762, 42 L. ed. 96; Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 59 Pac. 607, 617, 50 L. R. A. 209; S. C., 182 U. S. 499, 21 Sup Ct. Rep. 885, 45 L. ed. 1200.

32 Ellet v. Campbell, 18 Colo. 510, 33 Pac. 521.

which ruling was followed by the circuit court of appeals for the eighth circuit, overruling the decision of Judge Hallett above referred to.[33]

The supreme court of Montana has stated that when veins or lodes are discovered in the tunnel, the claimant will be entitled, as a matter of right, to the vein or lode for fifteen hundred feet in length,[34] and this was the understanding of the law expressed by the commissioner of the general land office.[35]

The supreme court of the United States has definitely settled the question by announcing the rule that the right of a tunnel locator to locate a claim to the vein arises upon its discovery in the tunnel, and may be exercised by locating that claim the full length of fifteen hundred feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire.[36]

§ 482. Necessity for appropriation of discovered lode by surface location.—It being well established that the tunnel discoverer is entitled to fifteen hundred feet in length on his discovered lode, the inquiry naturally suggests itself: How is he to disclose his intention as to the extent and direction in which he shall take it, so as to inform others where his rights end and theirs may begin? How are other prospectors to find out where to search for or locate lodes, with due regard to the rights of the tunnel discoverer?

[33] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. 200, 13 C. C. A. 390.

[34] Hope M. Co. v. Brown, 7 Mont. 550, 555, 19 Pac. 218. At one time a state law existed in Montana limiting the extent to three hundred feet on each side of the discovery, but this has since been repealed by implication. Civ. Code 1895, § 4672; Pol. Code 1895, § 5186.

[35] Commissioner Drummond, Copp's Min. Dec. 144.

[36] Enterprise M. Co. v. Rico-Aspen M. Co., 167 U. S. 108, 113, 17 Sup. Ct. Rep. 762, 42 L. ed. 96.

Judge Hallett, in the case of Rico-Aspen Cons. M. Co. v. Enterprise M. Co.,[37] ruled that in case of a location based upon discovery made in a tunnel, it is as necessary to mark the boundaries on the surface and file a certificate for record as in any other case. This would seem to be in accord with the views of Commissioner Williamson, who instructed the surveyor-general of Colorado, that—

> No patent can issue for a vein or lode without surface ground, and as the surface which overlies the apex of a vein or lode, discovered in a tunnel can only be ascertained by sinking a shaft, or by following a lode up on its dip from the point of discovery, no survey of such lode will be made until the exact surface ground is first ascertained;[38]

and this ruling has been uniformly adhered to by the land department.

The supreme court of Colorado, however, took a different view. It announced the rule that location on the surface by defining surface boundaries is not necessary.

Its argument is based upon the following reasoning:—

> Section twenty-three hundred and twenty-three was obviously designed to encourage the running of tunnels for the discovery and development of veins or lodes of the precious metals not appearing upon the surface and not previously known to exist. Little encouragement would the act give if the discoverer of the lode in a tunnel were bound also to find the apex and course of such vein, uncover the same from the surface, sink his location shaft thereon, mark the boundaries thereof, and record his

[37] 53 Fed. 321, 324.

[38] 4 Copp's L. O. 102. See, also, In re David Hunter, Copp's Min. Lands, 231.

certificate of such surface location, the same as if he had made the original discovery from the surface.

The location of a lode from the surface is always attended with more or less difficulty and uncertainty. Mistakes occur in the location of boundary lines, even where the apex and course of the vein lie comparatively near the surface. These difficulties and uncertainties are liable to be greatly increased where a lode is discovered by means of a tunnel driven hundreds and thousands of feet into the heart of the great mountain. To require the discoverer of a lode in a tunnel to prospect for the vein upon the surface, and uncover and mark its boundaries so as to include the apex and course within the lines of the surface location, would be to require a work of supererogation, for no surface location is necessary for the convenient working of the lode discovered in a tunnel location already made. Such requirement would unnecessarily burden the tunnel locator and discoverer; to the great labor and expense of tunneling as a means of a location and discovery, it would add the labor and expense devolving upon the ordinary surface discoverer and locator. Besides, such a requirement would subject the discoverer of a lode in a tunnel to the hazard of a race for its surface location; and thus the discoverer might have the fruits of his labor wrested from him by a surface locator who had done nothing and expended nothing in the original discovery.[39]

The location of the lode discovered in the tunnel in this case was by posting a notice at the mouth of the tunnel, claiming seven hundred and fifty feet on each side of the discovery point in the tunnel, five hundred and ninety-four feet from its face. A notice was also recorded in the county recorder's office, corresponding with the posted notice.

[39] Ellet v. Campbell, 18 Colo. 510, 519, 520, 33 Pac. 521, 524.

The supreme court of the United States, in affirming the decision of the state court, thus expresses itself:—

It will be noticed that the tunnel company posted at the mouth of the tunnel a notice of its discovery of this lode and the extent of its claim thereon, and also that it caused to be filed in the office of the recorder of the county a location certificate, as required by the local statute. Mills' Ann. Stats., secs. 3150, 3151. It will also be perceived that sec. 2323, Rev. Stats., gives to the tunnel discoverer the right of possession of the veins. It in terms prescribes no conditions other than discovery. The words "to the same extent" obviously refer to the length along the line of the lode or vein. Such is the natural and ordinary meaning of the words, and there is nothing in the context or in the circumstances to justify a broader and different meaning. Indeed, the conditions surrounding a vein or lode discovered in a tunnel are such as to make against the idea or necessity of a surface location. We do not mean to say that there is any impropriety in such a location, the locator marking the point of discovery on the surface at the summit of a line drawn perpendicularly from the place of discovery in the tunnel, and about that point locating the lines of his claim, in accordance with other provisions of the statute. It may be true, as suggested in Morrison's Mining Rights, 8th edition, page 182, that before a patent can be secured there must be a surface location. Rev. Stats., sec. 2325. But the patent is not simply a grant of the vein, for, as stated in the section "a patent for any land claimed and located for valuable deposits may be obtained in the following manner." It must also be noticed that sec. 2322, in respect to locators, gives them the exclusive right of possession and enjoyment of all the surface within the lines of their locations, and all veins, lodes, and ledges, the tops, or apexes, of which are inside such lines. So that a

location gives to the locator something more than the right to the vein which is the occasion of the location. But without determining what would be the rights acquired under a surface location based upon a discovery in a tunnel, it is enough to hold, following the plain language of the statute, that the discovery of the vein in the tunnel, worked according to the provisions of the statute, gives a right to the possession of the vein to the same length as if discovered from the surface, and that a location on the surface is not essential to a continuance of that right. We do not mean to hold that such right of possession can be maintained without compliance with the provisions of the local statutes in reference to the record of the claim, or without posting in some suitable place, conveniently near to the place of discovery, a proper notice of the extent of the claim—in other words, without any practical location. For in this case notice was posted at the mouth of the tunnel and no more suitable place can be suggested, and a proper notice was put on record in the office named in the statute.[40]

Mr. Morrison, in the fourteenth edition[41] of his work on "Mining Rights," seems to think that this rule has been repudiated by the decision of the supreme court of the United States in Creede & Cripple Creek M. & M. Co. v. Uinta M. & M. Co.,[42] and states the law to be that there must be a marking on the surface. While we concur with Mr. Morrison that this should be the rule, we are unable to agree that the court intended in its later decision to recede from its position in Campbell v. Ellett. Mr. Costigan agrees as to this.[43] Obviously, if the locator desires to secure a patent, he will

[40] Campbell v. Ellet, 167 U. S. 118, 119, 17 Sup. Ct. Rep. 765, 42 L. ed. 102, 18 Morr. Min. Rep. 669.

[41] Page 291.

[42] 196 U. S. 337, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

[43] Costigan's Mining Law, p. 241.

be compelled to make a surface location. But he is not called upon to apply for a patent.

With this statement of the law as it is found in the above excerpt from the opinion of the supreme court of the United States there are suggested several important inquiries which remain to vex the courts and harass the miner. We will present some of these for consideration in a subsequent section.[44]

A discovery may be made in any ordinary tunnel not located under the tunnel laws. To complete his initiatory rights, however, the locator must in such case make a surface location the same as in cases of ordinary surface discovery.[45] It is only when the tunnel-site has been properly located and claimed under the tunnel laws that the vein discovered in the tunnel need not be located at the surface.

§ 483. To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with reasonable diligence operate as a withdrawal of the surface from exploration by others?—It seems to be assumed by many, if not all, of the courts that a

[44] *Post*, § 491.

The state of Nevada has endeavored to avoid the dangers flowing from the lack of surface marking, and has passed an act which provides that claims upon blind veins or lodes discovered in the tunnel shall be located upon the surface and held in like manner as other lode claims (Nev. Comp. Laws, 1900, § 229; Rev. Laws 1912, § 2443). In the second edition of this work the author expressed the view that this legislation was subject to the criticism that if under the federal law no surface marking was required, the state could not insist upon that requirement. However, the supreme court of the United States subsequently decided that tunnel locations were subject to local regulations and state legislation. (Creede & Cripple Creek M. Co. v. Uinta T. M. & M. Co., 196 U. S. 337, 355, 25 Sup. Ct. Rep. 266, 49 L. ed. 501), and probably the Nevada statute will be upheld as an exercise by the state of its power to regulate tunnel locations and rights flowing therefrom.

[45] Brewster v. Shoemaker, 28 Colo. 176, 63 Pac. 308, 309.

tunnel location once perfected in accordance with the departmental regulations has the effect of withdrawing from the body of the public domain a certain superficial area, within which, so long as work in the tunnel is prosecuted with reasonable diligence, surface exploration is practically inhibited, or at least the prospector within that area locates at his peril.

We find that this question, with others incidentally involved, has been before the courts of Colorado, Montana, and Idaho, the federal courts in the eighth circuit, and the supreme court of the United States. Ordinarily, a decision by the latter tribunal so forecloses the question decided that further discussion is both unnecessary and unwise. However, there are still so many questions undecided arising out of tunnel locations and the location of blind veins based on discoveries in the tunnel, that we are impressed with the expediency of taking up the subject outlined in the title to this section and dealing with it from an historical or evolutionary point of view.

§ 484. The Colorado rule.—The case of Corning Tunnel Co. v. Pell[46] involved a controversy between the tunnel company locating a tunnel in September, 1872, and the locators of the Slide lode, located August 17, 1875.

The Slide lode was fifteen hundred feet in length, and crossed the center line of the tunnel-site nearly at right angles. The discovery shaft was near, but not on, the center line, being about fifty-five feet therefrom. The lode had not been reached or cut by the tunnel.

The tunnel-site as claimed described a parallelogram, three thousand by fifteen hundred feet. The

[46] 4 Colo. 507, 14 Morr. Min. Rep. 612.

tunnel had been worked with reasonable diligence, and had not been abandoned. The owners of the Slide lode applied for a patent, and the tunnel company adversed. The action was in support of the adverse claim and to try the title to the Slide lode.

It was contended by the tunnel claimant that the "line of the tunnel" meant the entire width and length of the surveyed tunnel-site,—that is, fifteen hundred by three thousand feet; that within these limits, after the commencement of the tunnel and while it is being prosecuted with diligence, no valid location could be made of a vein or lode not appearing upon the surface.

The supreme court of Colorado held:—

(1) That there was no law authorizing a tunnel location of any such dimensions; that the line of tunnel was the width marked by the exterior lines or sides of the tunnel;

(2) That the result contended for by the tunnel claimant forbids its adoption, unless the language clearly indicates such to have been the legislative intent. In this case, the tunnel-site location would withdraw from the exploration of prospectors over one hundred acres of mineral lands. A very limited number of tunnel locations would cover and monopolize, in most cases, an entire mining district, giving to a few tunnel owners all its mines, not upon the condition of discovery and development, but upon the easy condition of a *commencement* of the work on the tunnel and its prosecution with reasonable diligence. The policy of the general government has been to prevent monopoly of its mineral lands, or its ownership in large tracts. But for the existence of this policy, there was but little or no reason for an abandonment of its sys-

tem of surveys and pre-emptions applicable to agricultural lands, and the adoption as to its mineral lands of a system that, as to surface claims at least, limits mining locations to an inconsiderable acreage appendant to a discovered lode. The construction claimed is in contravention of this policy; nor can it be justified by the language of the section;

(3) No right of possession of a lode inures to the tunnel claimant until it is *discovered* in the tunnel;

(4) The Slide lode, not having been discovered in the tunnel by the tunnel proprietor, and the "location,"—i. e., *discovery*,—not being on the line thereof, the tunnel proprietor had no right to the lode.

This is a clear enunciation of the rule, that the mere location of the tunnel-site does not withdraw the surface adjacent to the tunnel *line* from exploration and location; that the tunnel is only a means of discovery, and that priority of discovery establishes a priority of right.

Fifteen years later the same tunnel-site was again brought to the attention of the same court, in the case of Ellet v. Campbell,[47] upon the following state of facts:—

The tunnel claimant, on February 3, 1875, discovered in the tunnel, on the line thereof, five hundred and ninety-four feet from the face, the Bonanza lode, and located it by posting a notice at the mouth of the tunnel and recording a similar notice as described in a preceding section.[48]

The Bonanza lode did not appear upon the surface of the ground, and was not known to exist prior to discovery in the tunnel. It was not staked on the sur-

[47] 18 Colo. 510, 33 Pac. 521, 524.

[48] § 482.

face. No discovery shaft was sunk, or work done upon the surface. The annual work on the lode was regularly performed. On July 10, 1886, Campbell, the defendant, and another made a location of the J. L. Sanderson lode, which was identical with the Bonanza lode. Their location was based upon a discovery made in a "cut," two hundred feet to the east of the east line of the bore of the tunnel. At the time of marking the Sanderson location, the locators knew of the discovery theretofore made in the tunnel. The locators of the Sanderson lode applied for a patent, the tunnel claimant adversed, and hence the suit.

Upon this state of facts, the supreme court of Colorado held that having made a discovery in the tunnel, the discoverer is not bound to make another discovery and location of the lode from the surface, in order to be protected against a subsequent surface locator of the same lode.

Having determined that it was not necessary to mark the location on the surface, and that the manner of location heretofore described was sufficient, the appropriation of the lode having been perpetuated by continued performance of the annual work, no other conclusion could possibly have been reached by the court than the one announced.

As heretofore noted, the decision of the supreme court of Colorado was affirmed by the supreme court of the United States.[49]

§ 485. **The Montana rule.**—At the time the cases considered by the supreme court of Montana arose, there was a state statute, which had been enacted in

[49] Campbell v. Ellet, 167 U. S. 118, 119, 17 Sup. Ct. Rep. 765, 42 L. ed. 1021, 18 Morr. Min. Rep. 669.

1872, and which contained among others the following provisions:—

> Any person or persons pre-empting any tunnel have the exclusive right to three hundred feet on each side from the center of said tunnel, on any and all lodes that he or they may discover in the course of said tunnel.

In June, 1887, the Hope Mining Company located the Jubilee tunnel in Deer Lodge county, Montana. In the following December, Brown located a quartz claim within three hundred feet of the line of the tunnel, basing his location upon a *discovery in a tunnel*, and was engaged in extracting ore therefrom when the Hope Mining Company sought an injunction preventing further mining operations by the quartz claimant. The ledge in controversy had not been discovered in the Jubilee tunnel, although the complaint alleged that it appeared to cross it.

The supreme court of Montana held:—

(1) That a tunnel claimant upon discovering a vein or lode in his tunnel will be entitled as a matter of right to the vein or lode for fifteen hundred feet in length along its course, and to the extent of three hundred feet on each side thereof from the middle of the vein;

(2) Brown's location is valid, though liable to be divested by the subsequent discovery of the same vein in the Hope tunnel, if such location is found to be within three hundred feet from the middle, and fifteen hundred feet from the point of, the tunnel discovery, measured along the vein. That third parties have the right to locate any veins within three hundred feet of the line of the tunnel, which is held to be the width of the sides thereof, but such locations so made are at

the risk of the locators; for upon the discovery of the vein or lode in the tunnel all locations made subsequent to its commencement become invalid if they are within the distances above specified.

The court also adds the following:—

> As a matter of course, veins or lodes *discovered from the surface*, or previously known to exist, are not affected by the right of the tunnel claimant, *which we may here remark to be most ample and sweeping.*

The injunction was denied.[50]

It is extremely difficult to ascertain precisely what the court meant by the language used in the quoted paragraph. If a discovery from the surface made prior to discovery in the tunnel, but after the perfection of the tunnel location, would take precedence over the subsequent tunnel discovery, it is difficult to understand the closing remark, that the tunnel proprietor's rights are most ample and sweeping.

Another case between the same parties, involving the same relative rights, came before the same court a few years later, wherein it appeared that Brown had applied for a patent for his location made as indicated in the previous case. The tunnel company adversed, and the action was to determine the adverse claim.

The court held, upon the showing made, that the applicant for patent ought to be restrained from prosecuting his proceedings while the tunnel proprietor is prosecuting his tunnel as required by law, and until it is demonstrated that such vein, or lode, will not be discovered in the tunnel, or until such tunnel rights are abandoned by failure to prosecute the tunnel as provided by law.[51]

[50] Hope M. Co. v. Brown, 7 Mont. 550, 19 Pac. 218, 221.

[51] Hope M. Co. v. Brown, 11 Mont. 370, 28 Pac. 732, 735.

It must be conceded that the views of the supreme court of Montana tend to support the doctrine that a perfected tunnel-site practically withdraws the surface to the extent of fifteen hundred feet on each side of the line of the tunnel, and that the withdrawal remains in force until it is either demonstrated that a given lode will not be cut in the tunnel or the tunnel-site is abandoned.

§ 486. **The Idaho rule.**—In the case of Back v. Sierra Nevada Cons. M. Co.[52] the following state of facts appeared:—

The complaint alleged in substance that Back owned the Pilgrim tunnel, located April 5, 1886. On April 6, 1886, defendant's grantors entered *upon the line* of the tunnel at a point where post number nine on said line was planted. They had full knowledge of the existence of the post and the location of the tunnel. They commenced to prospect for minerals, and at a depth of twelve feet discovered a ledge.

This ledge was blind, and would have been intersected by the tunnel continued on the location line thereof. Defendant's grantors located and recorded a mining claim called the Sierra Nevada, and afterward made application for patent. Back filed an adverse claim, and the suit was brought to determine the rights of the parties. A demurrer to the complaint was sustained. Judgment passed for defendant on failure to answer. The appeal was prosecuted from the judgment.

It was held by the supreme court of Idaho, reversing the judgment:—

(1) That a tunnel location is a "mining claim," and the locator may protect his rights by adversing appli-

52 2 Idaho, 386, 17 Pac. 83, 85.

cation for patent to ledges asserted to have been located on the line of said tunnel subsequent to the tunnel location;

(2) It is evident that, in enacting section twenty-three hundred and twenty-three of the Revised Statutes, congress intended to withdraw from exploration for lodes not appearing upon the surface so much of the public domain as lay upon the *line* of the tunnel;

(3) The tunnel claimant has a right to the possession, for prospecting purposes, of the area in dispute, and to show that the respondent's location was upon the line of his tunnel.

No attempt is made to define what is meant by the *line* of the tunnel.

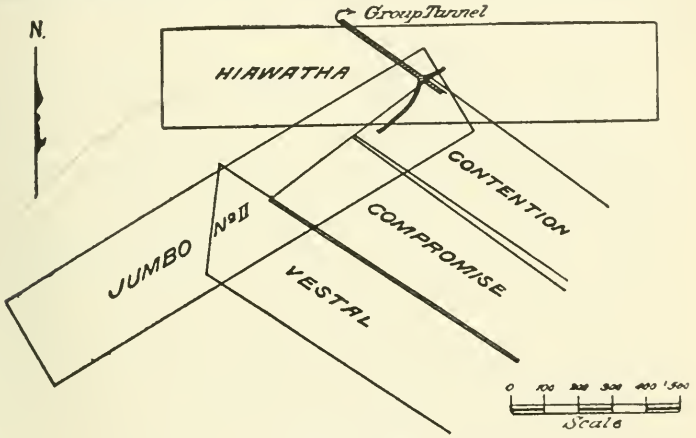


FIGURE 42.

§ 487. **Judge Hallett's views.**—The tunnel law came before Judge Hallett in the case of Rico-Aspen Cons. M. Co. v. Enterprise M. Co.[53] His decision is accompanied by a diagram, which we herewith reproduce as Figure 42.

[53] 53 Fed. 321, 323.

The facts were substantially as follows:—

The Rico-Aspen company asserted title to three mining claims,—the Vestal, located in 1879; Contention, January 1, 1888; and Compromise, November 18, 1889. The Hiawatha was not necessarily involved in the litigation, although it may be noted that its location was junior in point of time to the inception of the tunnel right.

The Enterprise Mining Company perfected its location of the Group tunnel in July, 1887; and in June, 1892, discovered and located the Jumbo II claim, delineating it upon the surface as indicated on the diagram.

Said Judge Hallett, after quoting the language of section twenty-three hundred and twenty-three of the Revised Statutes:—

> Clearly enough, this is a grant of lodes and veins on the line of the tunnel, and the only difficulty is in ascertaining the extent of the grant. The supreme court of this state (referring to Corning Tunnel Co. v. Pell) interprets the act as giving only so much of such veins and lodes as may be in the tunnel itself. But this seems to reduce the grant to a point of insignificance which deprives the act of all force and meaning. Certainly, no one would be at the trouble and expense of driving a tunnel through a mountain for such small segments of lodes or veins as may be in the bore of the tunnel. On the other hand, respondents contend that the grant is of the length of a surface location in any direction from the line of the tunnel, and as stated, almost the entire length of the Jumbo II is in a southwesterly direction from that line. Under this construction, the location of a tunnel, followed by some lazy perfunctory work twice in the year, will have the effect to withdraw from the public domain a tract three thousand feet square, or something more than a half section of land; and this in the face of the earlier

declaration of the statute, that "no location of a mining claim shall be made until the discovery of the vein, or lode, within the limits of the claim located." This view is so far inconsistent with the general policy of the law which forbids the granting of large areas of valuable mineral lands to one person or company that it seems impossible to accept it.

The conclusions reached by Judge Hallett may be thus summed up:—

(1) The length of a location made upon a lode discovered in a tunnel is not fixed by the act of congress, but is left to local regulations;

(2) Without local regulation as to length of a claim founded on a discovery in a tunnel, nothing would pass but the line of the tunnel itself;

(3) The Colorado statute of 1861[54] was then in force and secured to the tunnel locator two hundred and fifty feet each way from the tunnel, on all lodes discovered within the tunnel. As to the two hundred and fifty feet, the tunnel proprietor becomes the owner of the ledge, its location dating back to the inception of the tunnel right;[55]

(4) As to the Vestal, owing to the priority of its location, decree passed for complainant. As to the Compromise and Contention, their location should, to the extent sanctioned by the state law, yield to the rights of the Jumbo II, which related back to the inception of the tunnel right.

§ 488. The doctrine announced by the circuit court of appeals, eighth circuit.—An appeal was taken from Judge Hallett's decree in the Rico-Aspen-Enterprise

[54] Mills' Annot. Stats., § 3141.

[55] This statute has since been repealed, Stats. 1911, p. 515.

case, and the appellate court declined to adopt his views.[56] When the case was before Judge Hallett, the facts as they are recited in the opinion fixed 1879 as the date of the Vestal location, prior in point of time to the location of the Group tunnel. For this reason it received but little attention, the reasoning of the judge being particularly addressed to the Contention and Compromise, which were junior in point of time to the tunnel location, although senior with reference to the tunnel discovery.

The case as presented to the appellate court seems to be somewhat different, the controversy apparently centering within the conflict area between the Vestal and Jumbo II, and the record seems to give to the former a date of location, *junior*, in point of time, to the inception of the tunnel right.

The principles involved, however, are, of course, the same.

The questions involved are presented by the appellate court in the following form:—

(1) Are the owners of a valid tunnel mining claim under section twenty-three hundred and twenty-three of the Revised Statutes, who have discovered a blind vein in their tunnel and have duly located and claimed it, entitled, as against the owners of a lode mining claim located from the surface after the location of the tunnel-site, but before the discovery of the vein in the tunnel, to the possession of the vein or lode thus discovered, when such vein was not known to exist prior to the location of the tunnel, but was first discovered in another lode mining claim before its discovery in the tunnel?

[56] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed, 201, 206, 13 C. C. A. 390.

(2) If the owners of a tunnel mining claim are entitled to the possession of any portion of such a vein, to what extent are they entitled to it?

Another question was also presented and decided which refers to the effect of a patent issued upon the junior surface location where the tunnel claimant failed to adverse. The discussion of this branch of the case will be deferred until we reach, in another portion of the work, the subject of patent proceedings and the legal effect of a patent when issued.[57]

As preliminary to a discussion of the principles involved, the court announced as follows:—

> There is no tenable middle ground under this section between a holding that the diligent owner of a tunnel is entitled to the possession of all blind veins he discovers in his tunnel to the same extent along the veins as if he had discovered them at the surface, and a holding that by the discoveries and locations of others, subsequent to the commencement of his tunnel and before it reaches the veins at all, he may be deprived of every portion of them, except possibly the small segments within the bore of the tunnel.

The conclusions reached by the court may be thus stated:—

(1) The location of a tunnel-site, followed by the prosecution of work thereon with reasonable diligence, gives to the tunnel locator an inchoate right to all hitherto unknown or undiscovered veins which cross the line of the tunnel and are discoverable therein;

(2) That upon the discovery in the tunnel, the tunnel locator will be entitled to fifteen hundred feet along the length of the vein, computed in either direction from his tunnel discovery, and that this right cannot be im-

[57] *Post*, § 725.

paired by a discovery and location from the surface, junior in point of time to the inception of the tunnel right;

(3) The state statute of Colorado, fixing the limit in length at two hundred and fifty feet on each side of the tunnel line, is superseded by the act of congress;[58]

(4) In determining what length on the vein is allowed to the tunnel discoverer, the court resorts to section twenty-three hundred and twenty of the Revised Statutes, but decides that such section performs no other function in determining the rights of the tunnel discoverers.

The court also holds that the inchoate right given to the tunnel locator only extends to veins that strike the line of the tunnel and are discovered in the tunnel. Others may discover and hold all veins within fifteen hundred feet of the line of the tunnel that do not strike or cross its lines, and all that do strike it that are not discovered in it.

The reasoning applied by the court which, in its judgment, justified the results reached may be thus epitomized:—

(A) Section twenty-three hundred and twenty-three construes itself, and it is unnecessary to resort to public policy in aid of its interpretation;

(B) If the question of public policy is to be resorted to, the rights guaranteed to the tunnel locators are in accord with such policy, which is to encourage the discovery and development of the mineral resources of the country;

(C) The work of driving tunnels thousands of feet into the side of a mountain for the purpose of discovering a vein or lode that is not known to exist at all is

[58] This has since been specifically repealed.

an extremely hazardous and expensive undertaking; that this is common knowledge, and congress must be taken to have had this knowledge when they enacted the law. They must have known that such a hazardous enterprise was not likely to be undertaken unless rewards commensurate with the risk and expense were offered.

It is to be added, by way of a sidelight on this decision, that the discovery on which the Vestal location was based was not upon the vein which was discovered in the tunnel. The right of the tunnel locator to the vein discovered in the tunnel, in so far as it was found within the Vestal location, was also defended on the ground that it was a cross-lode, and that under the rule then recognized by the state courts of last resort in Colorado, which we will discuss fully in a subsequent chapter, owners of cross-lodes might follow their vein into, and underneath, even a prior location.

§ 489. Tunnel locations before the supreme court of the United States.—The case of Glacier Mountain Silver Mining Company v. Willis[59] was an action of ejectment, wherein the plaintiff sought to recover possession of the Silver Gate tunnel claim, located in 1865, alleged to be five thousand feet long and five hundred feet wide, described by metes and bounds, which was alleged to embrace many valuable lodes or veins which had been discovered, worked, and mined by the plaintiff and his grantors. Possession and payment of taxes for a period in excess of the statute of limitations prescribed by the laws of Colorado were averred, together with a general allegation of ownership of the tunnel claim described. The ouster alleged was (1) an entry by defendants upon the premises and *into the tunnel*,

[59] 127 U. S. 471, 481, 8 Sup. Ct. Rep. 1214, 32 L. ed. 172.

claiming said tunnel as the War Eagle, and (2) the location by defendants of the Tempest lode claim across the tunnel, claiming a discovery *in the tunnel* of such lode.

A special demurrer was interposed upon the ground, among others, that the claim of plaintiff to a strip of ground five thousand feet in length by five hundred feet in width as a tunnel-site is unwarranted and unprecedented, and was not, at the date of said pretended location, nor at any subsequent time, authorized by any local, state, or congressional law.

The court below sustained the demurrer. The supreme court of the United States, in reversing the judgment, held:—

(1) That the claim for five thousand feet in length was void only as to the excess over three thousand feet;

(2) The tunnel location having been made prior to the passage of the act of May 10, 1872, the rights flowing therefrom are to be determined under the local rules and customs in force at the time the location was made.

It is manifest that this decision sheds no light upon the subject. We refer to it for the reason that in several of the decisions heretofore cited it was stated that the conclusions there reached were not opposed to the doctrine of the Glacier Mountain-Willis case. This is quite true, for the simple reason that the questions which we are now considering were not there involved, discussed, or decided. But they were subsequently involved and decided by the supreme court of the United States in the case of Enterprise M. Co. v. Rico-Aspen M. Co.,[60] and the doctrine finally settled to the following effect, as stated in the *syllabus* to the opinion:—

[60] 167 U. S. 108, 17 Sup. Ct. Rep. 762, 42 L. ed. 96.

The clear import of the language of Rev. Stats., sec. 2320, is to give to a tunnel owner discovering a vein in the tunnel a right to appropriate fifteen hundred feet in length on that vein; which right arises upon the discovery of the vein in the tunnel; dates by relation back to the time of the location of the tunnel-site; may be exercised by locating the claim the full length of fifteen hundred feet on either side of the tunnel or in such proportion thereof on either side as the locator may desire; and is not destroyed or impaired by the failure of the owner of the tunnel to adverse a previous application for a surface patent before the discovery of the vein.

§ 490. **Opinions of the land department.**—We note the following views expressed by the land department:—

(1) A claim under a tunnel location is a mining claim, and the locator should adverse a junior application for patent for a lode within its claimed limits;[61]

(2) Prospecting for lodes not previously known to exist is prohibited on the line of the tunnel (i. e., the width of the tunnel bore) while work on the tunnel is being prosecuted with reasonable diligence;[62]

(3) In no case can a tunnel proprietor record a claim so as to absorb the actual or constructive possession of other parties, on a lode which had been discovered and claimed outside the *line* of the tunnel before the discovery thereof in the tunnel.[63]

61 Secretary Kirkwood, Bodie Tunnel & M. Co. v. Bechtel Cons., 1 L. D. 584.

62 Commissioner Williamson, In re David Hunter, Copp's Min. Lands, 231.

63 Commissioner Drummond's letter to Chaffee, Copp's Min. Dec. 144. See, also, Corning Tunnel Co. v. Pell, 3 Copp's L. O. 130. We have heretofore noted the decisions of this department defining the *line* of the tunnel to be the width of the bore. *Ante*, § 473.

Necessarily, these views are now obsolete, in the light of the rulings of the supreme court of the United States heretofore noted.

§ 490a. Rights of junior tunnel locator as against senior mining claims on the line of the tunnel.—There should be little room for the discussion of this question. No subsequent mining location of any kind can impair rights vested under prior locations. And yet it has been contended that one who locates a tunnel claim has the right to drive through property covered by a senior location. In other words, it has been claimed that the grant of a mining claim is accompanied by the implied right of way through it in the interest of a junior tunnel locator, or that state statutes may impose such a burden on prior claims.

As to these contentions, Judge Lunt, in deciding the leading cross-lode case of Ajax Gold Mining Company v. Calhoun Gold Mining Company, thus expressed his views:—

> The Revised Statutes of the United States do not give the tunnel locator any such right, but negative any such assumption. A patent to a lode claim grants all veins whose tops, or apexes, are within the side-lines of the claim, etc., to the lode claim, whether they are known or not; hence no discovery of them on subsequently located ground can be made. There may be a vague notion that the right to penetrate a lode claim by a tunnel may have existed, and it may have been done many times heretofore with or without the permission of the owner, but it is idle to pretend that any such custom has ripened into law. . . . . I do not think the tunnel can penetrate the plaintiff's claims.[64]

The supreme court of Colorado, in affirming Judge Lunt's decision, held that under the statutes the subse-

64 1 Leg. Adv. 426, 429.

quent locator has no right to penetrate a senior valid subsisting location underneath its surface boundaries extended downwardly, except for the purposes specified in the mining laws, and that these exceptions do not include a right to drive a tunnel through such a location for the purposes of discovery.[65]

This rule received the approval of the supreme court of the United States.[66]

The owner of a location holding the apex of a vein may enter the land adjoining in the exercise of the extralateral right, but in doing so he must follow the vein on its downward course. He has no right to approach and work the vein through crosscut tunnels run underneath such adjoining lands.[67]

The supreme court of the United States in affirming this principle[68] suggests an apt illustration of the effect of the ruling. This we present in figure 42A.

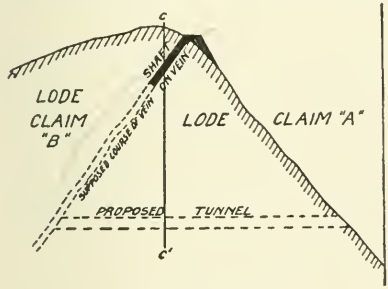


FIGURE 42A.

The owner of the claim containing the apex of vein may follow it on its downward course in the plane of the vein which forms the hypothenuse of the triangle. He cannot, however, crosscut into his neighbor's territory to reach the vein at a lower level.

[65] Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 59 Pac. 607, 618, 50 L. R. A. 209.

[66] Id., 182 U. S. 499, 507, 21 Sup. Ct. Rep. 885, 45 L. ed. 1200.

[67] St. Louis M. & M. Co. v. Montana M. Co., Ltd., 113 Fed. 900, 902, 51 C. C. A. 530.

[68] St. Louis M. & M. Co. v. Montana M. Co., 194 U. S. 235, 236, 24 Sup. Ct. Rep. 654, 48 L. ed. 953.

As to the validity of state statutes purporting to grant a right of way to junior tunnel locators, Judge Lunt, in the opinion above referred to, observed, in speaking of a Colorado statute which had been held not to be in force, that even if it were in force a grave question arises whether a lode claim granted by the United States could be burdened with such an inchoate easement by a state legislature.

There is a law now upon the statute books of Colorado which attempts to confer the right upon a tunnel owner to drive his tunnel through and across any located or patented claim in front of the mouth of such tunnel.[69] Idaho has a similar statute.[70]

This class of legislation is unquestionably unconstitutional. It is the taking of private property without purporting to provide any compensation therefor.

The Colorado statute has been declared unconstitutional by Judge Hallett.[71]

We think it quite well settled that easements and rights of way may be acquired over the public domain, but after it passes into private ownership no such rights can be asserted, except for public purposes, or possibly for limited private uses, if provided for by the state constitution. In such cases, unless consent is obtained, condemnation proceedings are necessary.[72]

69 Act of April 17, 1897, Laws Colo. 1897, pp. 181, 182; Mills' Annot. Stats. 1905, §§ 3141a–3141d. It is possible that this statute may have been repealed by implication. It is not carried into the Revised Statutes of 1908. In 1907 an eminent domain statute was passed which authorizes condemnation for ore carrying purposes by means of a tunnel. Rev. Stats. 1908, §§ 2435–2438.

70 Civ. Code, 1901, §§ 2575, 2578; Laws 1899, pp. 653, 654; Rev. Codes 1908, §§ 3236–3239.

71 Cone v. Roxana G. M. & T. Co., 2 Leg. Adv. 350; Stratton v. Gold Sovereign M. Co., 1 Leg. Adv. 350; Portland G. M. Co. v. Uinta Tunnel M. & T. Co., 1 Leg. Adv. 494; Matoa G. M. Co. v. Chicago & Cripple Creek G. M. Co., vol. 78, Mining and Scientific Press, p. 379.

72 See Judge Lunt's opinion in Ajax G. M. Co. v. Calhoun G. M. Co.,

So far as the question under consideration involves the exercise of the right of eminent domain, we have heretofore fully presented it.[73]

Some reference to it will again be made in presenting the cross-lode questions.[74]

§ 491. Inquiries suggested in the light of rules thus far enunciated by the supreme court of the United States as to the extent of the rights of a tunnel locator on a vein discovered in the tunnel.—It is, as we have seen, now settled that the tunnel locator is entitled to fifteen hundred linear feet on the vein discovered in the tunnel, measured from the discovery in such direction as the locator may designate by a notice posted at the mouth of the tunnel. That he may drift along the vein from the tunnel level to the linear extent and in the direction claimed is now unquestioned. What are his rights in depth? Is he to be confined within rectangular planes, as, it is asserted, was the rule under the act of 1866,[75] or within planes parallel to the tunnel bore? May he fix end-lines arbitrarily, or has he the right to follow the vein downward at all?

If the tunnel law stands alone, there is no express grant of the extralateral right. This right, so far as lodes located at the surface are concerned, is granted by section twenty-three hundred and twenty-two of the Revised Statutes, which is neither adopted by nor referred to in the tunnel laws. Moreover, the right as defined in section twenty-three hundred and twenty-two is limited to locations having the tops, or apexes, of discovered veins within a surface location, and is confined within end-line planes marked at the surface.

1 Leg. Adv. 426, 429; St. Louis M. &. M. Co. v. Montana Limited, 113 Fed. 900, 902, 51 C. C. A. 530; Baillie v. Larson, 138 Fed. 177.

[73] *Ante*, §§ 252–264.

[74] *Post*, §§ 557–561.

[75] *Post*, § 576.

The only section of the mining laws to which the tunnel sections refer is twenty-three hundred and twenty, and this last-named section is held by the courts to apply only with regard to the length on the lode.[76]

If any right to follow the vein downward is to be exercised by the tunnel claimant, the courts will be compelled to define the limitations without any reference to the remaining sections of the Revised Statutes, and without resort to any previous miners' rules and customs, as none such ever existed. From what source will they seek light? Will not an effort to either recognize or define this right to follow the vein in its downward course be amenable to the criticism of judicial legislation? As no surface marking of the claim on the lode discovered in the tunnel is required, the entire body of the mining law touching the apex and the extralateral right predicated upon end-lines crossing the apex of the lode at the surface is eliminated from consideration, and it would seem that the courts are practically left without guide or compass.

It is conceded that no patent can issue for a claim on a lode without inclosing such claim on the surface within surface boundaries. Herein we have confirmation of the suggestion that blind lodes discovered in a tunnel must be relegated to a category by themselves. The general body of the mining laws does not apply to them. What, then, becomes of the extralateral right?

The suggestion offered by the supreme court of the United States, in its opinion in the Ellet-Campbell case,[77] that there would be no impropriety in marking a location on the surface perpendicularly overlying the

[76] Enterprise M. Co. v. Rico-Aspen M. Co., 66 Fed. 201, 204, 13 C. C. A. 390; S. C., on appeal, 167 U. S. 108, 109, 17 Sup. Ct. Rep. 762, 42 L. ed. 96.

[77] 167 U. S. 116, 119, 17 Sup. Ct. Rep. 765, 42 L. ed. 101, 18 Morr. Min. Rep. 669.

underground discovery, might be of practical advantage in the solution of some of the problems here discussed, if the surface location as marked fortuitously included the apex of the vein, which, for obvious reasons, in nine cases out of ten it would not. A surface location on the dip of the vein, although having priority, would not confer extralateral rights. If the rights under such a location are to be defined with reference to the general body of the mining law, they would be subordinated to the rights of a junior location properly covering the apex.

There is still another suggestion which presents increased difficulties. Could the tunnel locator, with his linear claim on the lode discovered in the tunnel, follow that vein upward? If so, how far and within what planes? There is no law which sanctions the following of a vein on its upward course. Let us illustrate some of these inquiries by the use of a diagram (Figure 43).

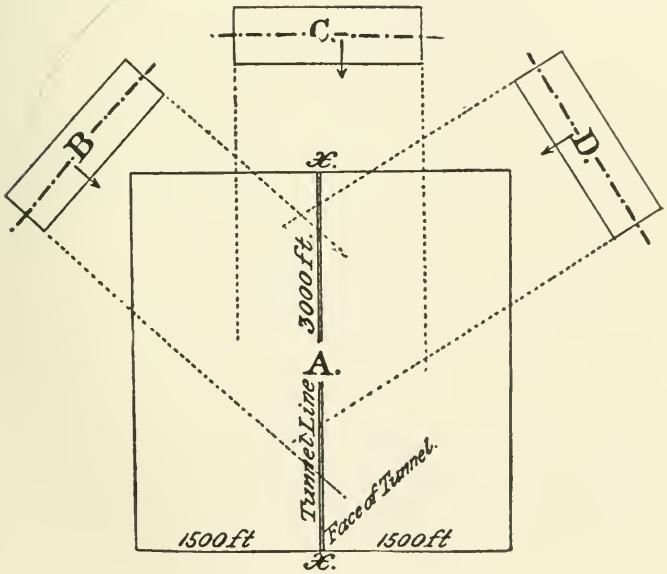


FIGURE 43.

A locates a tunnel-site on the line *x*—*x*, starting at the base of the mountain, and perfects his location prior to the surface discoveries and locations indicated by B, C, and D on the crest of the mountain. The veins of these surface locations—any one of them may be singled out for illustrative purposes—dip in the direction of the tunnel, as indicated by the arrows and extended end-line planes. It is probable, perhaps inevitable, that each one of these veins will, on its downward course, intersect the plane of the tunnel bore, and it requires no stretch of the imagination to assume that at some point, as the tunnel is driven into the hill, it may cut one or all of these veins. What will be the rights of the parties? The angle at which the tunnel must intersect these veins is not specified in the law. Nor does the law specify in terms that the apex of the vein must cross the line of the tunnel. In discovering and locating the claims, B, C, and D, the locators have not invaded the area of the tunnel location. They are all outside of the tunnel parallelogram, three thousand feet square, within which prospecting is practically inhibited. Yet if these veins are discovered in the tunnel, must not the rights of B, C, and D, although covering the apex and without the reserved area, yield to the right acquired by discovery in the tunnel? When the statute says that the tunnel discoverer shall be entitled to veins within three thousand feet of the tunnel, it must mean that he is entitled to such veins as are discovered within that distance. The statute does not limit his rights to lodes having their apices within three thousand feet of the face of the tunnel or within the limits of tunnel location three thousand feet square.

In the cases illustrated, may the tunnel discoverer follow the vein *upward*, or is there to be a horizontal

partition between the tunnel locator and the mining claimants of B, C, and D?

Mr. Costigan, in his excellent treatise on Mining Law,[78] entertains the view that the discoverer of a vein in a tunnel located for discovery purposes is not entitled to all veins discovered in the tunnel, but only those which have their apexes within the area of the tunnel location. He also thinks that the discoverer of the vein should be permitted to follow it upward to the apex and downward indefinitely within rectangular planes.

The principal difficulty with this solution is that there is no warrant for it in the statute. It presents an equitable method of settling a vexed question, and some court may in the future have the courage to adopt it. But we are of the opinion that it is a question with which congress alone may deal.

[78] Page 242.

CHAPTER V.

COAL LANDS.

ARTICLE I. INTRODUCTORY.
II. MANNER OF ACQUIRING TITLE TO COAL LANDS.

ARTICLE I. INTRODUCTORY.

§ 494. Foreword.
§ 495. Classification of coal as a mineral—History of legislation — Characteristics of the system.
§ 495a. Severance of title to underlying coal from title to surface—Agricultural entries of coal lands reserving coal to the United States.
§ 496. Rules for determining character of land.
§ 497. Geographical scope of the coal land laws.

§ 494. Foreword.—In dealing with the subject of coal lands and treating of the existing method by which title may be acquired to lands containing coal, we are embarrassed by the belief that the laws now upon the statute books dealing with this important branch of the public land laws are probably about to give way to a radically different system.

Almost all the areas containing known deposits of coal have been withdrawn from coal land entry. Those supposed to be valuable for this mineral are withdrawn for purposes of classification and valuation. While as coal lands are classified and valued they are restored to entry, it is quite apparent that the policy of the government, so far as it can be shaped by the executive and departmental officials, discloses an intention to retain these areas in a state of reservation to abide the action of congress upon the proposed conservation measures alluded to in a previous section.[1]

[1] § 200.

The plan which seems to find the most favor is that of a leasing by the government with reservation of royalty[2] and with an elastic power in the land department to deal with the situation, as to terms and time, according to local conditions and environment. A number of measures are now pending in congress, and each has its supporters. It is impossible for us to deal with prospective legislation. The situation as it confronts us compels us to deal with the laws which are now on the statute books, although from a practical standpoint they are not in active operation except where lands having been identified, classified and valued, they are restored to entry under the coal land laws as they now exist.

§ 495. Classification of coal as a mineral—History of legislation—Characteristics of the system.—As observed in a previous section,[3] prior to the passage of the coal land act of July 1, 1864, the land department did not regard coal as a mineral within the meaning of the prior legislation of congress, yet this substance, although essentially of vegetable origin, has, generally speaking, been classified as mineral, as it came within the etymological signification of the term, being obtained from underground excavations or "mines."[4]

The act above referred to[5] was the first legislation by congress providing a method for the disposal of coal lands. It was followed in the succeeding year by a

[2] See interesting address delivered by George Otis Smith, director of the Geological Survey at the American Mining Congress, Chicago, 1911, Mining & Scientific Press, vol. 103, p. 612. Also Report of Secretary Ballinger, June 30, 1909; Bulletin 424, U. S. Geological Survey, p. 45.

[3] *Ante*, § 140.

[4] *Ante*, § 88.

[5] 13 Stats. at Large, p. 343.

supplemental act,[6] and in 1873 congress passed a law which is the basis of the existing system.[7]

Whatever may have been the rule as to the classification of coal lands prior to the passage of the act of 1864, since that date they are classified as mineral by legislative construction.[8]

As heretofore noted,[9] lands containing coal are not, as a rule, excepted from the operation of the railroad grants,[10] nor are they considered by the department as lands subject to "mineral entry" within the meaning of the act of June 3, 1878,[11] granting the privilege of cutting timber upon so much of the public domain in certain states as is subject to mineral entry.[12]

Coal lands are mineral lands within the meaning, generally, of the laws relating to the public lands.[13] They may not be selected in lieu of lands in forest reserves.[14] But when found within forest reserves they are subject to appropriation the same as other mineral lands.[15]

It will serve no useful purpose to further retrace the history of congressional legislation on this subject.

[6] March 3, 1865, 13 Stats. at Large, p. 529.

[7] Rev. Stats., §§ 2347, 2352; 17 Stats. at Large, 607, 608; Comp. Stats., 1901, pp. 1440, 1441; 5 Fed. Stats. Ann. 55, 57.

[8] United States v. Mullan, 7 Saw. 466, 10 Fed. 785, 787; S. C., on appeal, 118 U. S. 271, 278, 6 Sup. Ct. Rep. 1041, 30 L. ed. 170; In re Crowder, 30 L. D. 92, 95; Brown v. Northern Pac. R. R. Co., 31 L. D. 29; United States v. Northern Pacific Ry., 170 Fed. 498, 500; S. C., on appeal, 176 Fed. 706, 709, 101 C. C. A. 117.

[9] *Ante*, § 152.

[10] See Rocky Mountain C. & I. Co., 1 Copp's L. O. 1.

[11] 20 Stats. at Large, p. 88; Comp. Stats. 1901, p. 1528; 7 Fed. Stats. Ann. 297.

[12] Instructions to Timber Agents, 2 L. D. 827.

[13] Brown v. Northern Pac. R. R. Co., 31 L. D. 29; Washington Securities Co. v. United States, 194 Fed. 59, 65.

[14] Id.

[15] In re Crowder, 30 L. D. 92, 95.

The coal land laws form a system peculiar to themselves, having nothing in common with the general mining laws, and strictly speaking, are not *in pari materia*. The ownership and possession of this class of public lands were never subject to regulation by local rules and customs, and from the passage of the first act in relation to them to the present time the method of acquiring title to them has been simple, and with the exception of certain classes of fraudulent entries as the result of unlawful combinations to secure large tracts of coal lands contrary to the law, has been unaccompanied by the perplexities that have arisen in the administration of the laws relative to lands containing lodes and placers. Such questions as have arisen between conflicting claimants in reference to coal have been adjudicated entirely within the land department. No controversies arising out of the proper construction of these laws are, in the process of obtaining title, relegated to the courts for determination. The coal land system, like that applicable to homestead, pre-emption, and other agricultural entries, is administered by the executive department of the government. For this reason we note the almost total absence of judicial decisions upon the subject, and must look, generally speaking, to the land department for the rules of interpretation.

§ 495a. **Severance of title to underlying coal from title to surface—Agricultural entries of coal lands reserving coal to the United States.**—Before entering upon the discussion of the manner in which title to coal lands may be acquired, it is pertinent to note that a distinctly new departure in governmental policy with regard to the administration of the coal land laws finds expression in two acts of congress, one passed on March

3, 1909,[16] and the other June 22, 1910,[17] both of which acts permit agricultural entries on lands containing or supposed to contain coal, the entryman obtaining title to the surface, the coal being reserved to the United States to be disposed of to others in the manner provided by laws in force at the time. The object of the first of these acts is thus stated by the general land office:—

> The main purpose of the act is to protect persons who in good faith have located, selected or entered under nonmineral laws, public lands which are, after such location, selection, or entry classified, claimed, or reported as being valuable for coal by providing means whereby such persons may, at their election, retain the lands selected or entered, subject to the right of the government to the coal therein. It applies alike to locations, selections and entries made prior to its passage and those made subsequently thereto. The act also provides for the disposal under the existing coal land laws of the coal contained in such lands.[18]

The act of June 22, 1910, is *in pari materia* with the first act. There is no inconsistency between them, and in the opinion of the commissioner of the general land office and the secretary of the interior both of them may have harmonious operation within their proper spheres.[19]

The general land office defines the scope of these two acts and the difference between them as follows:—

[16] 35 Stats. at Large, p. 844; Comp. Stats. (Supp. 1911), p. 613; Fed. Stats. Ann. (Supp. 1909), p. 653.

[17] 36 Stats. at Large, p. 583; 1 Fed. Stats. Ann. (Supp. 1912), p. 317.

[18] Circulars, March 25, 1909, 37 L. D. 528; amended Sept. 7, 1909, 38 L. D. 183.

[19] Circular, 38 L. D. 180, 41 L. D. 358.

> The earlier law provides a remedy in these cases in which entries, locations and selections have been or may be made for lands which, subsequently to entry, location or selection, have been or may be claimed, classified or reported as being valuable for coal, while the later act permits dispositions (therein named) to be made of lands valuable for coal notwithstanding that they may have been previously withdrawn or classified as such.[20]

The later act applies to unreserved public lands of the United States in those states in which the coal land laws are applicable, which have been withdrawn from coal entry and not released therefrom, or which have been classified as coal lands or which are valuable for coal though not withdrawn or classified. The act does not apply to Alaska.[21]

These acts enable any person desiring to make entry under the homestead laws or the desert land laws, and any state desiring to make selection under the Carey act, to acquire title to the surface of lands either classified as coal or supposed to be valuable therefor, the coal being reserved to the United States for future disposal.

By act of April 30, 1912,[22] the operation of the act of June 22, 1910, was extended to include selections by the several states under grants made by congress.[23]

As to the reserved coal, the act of June 22, 1910, provides as follows:—

> The coal deposits in such lands shall be subject to disposal by the United States in accordance with the coal land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the

[20] Circular, 39 L. D. 180; In re Woodhouse, 41 L. D. 145.

[21] Instructions, 39 L. D. 473.

[22] 37 Stats. at Large, 105.

[23] State of Wyoming, 41 L. D. 19; Instructions, 41 L. D. 89.

right to mine and remove the coal under the laws of the United States shall have the right at all times to enter upon the lands selected, entered or patented as provided by this act for the purpose of prospecting for coal thereon upon the approval by the secretary of the interior of a bond or undertaking to be filed by him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may re-enter and occupy so much of the surface as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom and mine and remove the coal upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages. *Provided*, that the owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits.[24]

The manner in which coal in the public lands is to be disposed of under existing laws will be later considered. The severance of title to the mineral from the title to the surface by the proprietor was a common occurrence in England.[25] The method adopted by the United States by the two acts above noted whereby the title to coal is thus severed has its parallel in the Mexican codes as to all metallic substances and certain classes of nonmetallic minerals. The right to denounce mines in private property in Mexico is recognized, and

[24] Section 3, Act of June 22, 1910, 36 Stats. at Large, p. 583; Comp. Stats. (Supp. 1911), p. 614; 1 Fed. Stats. Ann. (Supp. 1912), p. 317.

[25] *Ante*, § 9.

provision is made to compensate the owner of the surface.[26]

By act of congress passed August 24, 1912,[26a] agricultural entries are provided for in the state of Utah on land containing oil and natural gas, the entryman receiving a limited patent reserving the oil and gas to the United States, practically as in the case of coal.

A gradual extension of this method of dealing with the mineral deposits of the public domain is not unlikely.[27]

§ 496. Rules for determining character of land.— The determination of the mineral or nonmineral character of any given tract of public land is confided exclusively to the land department or, more accurately speaking, the general land office. This department formulates its own rules, prescribes forms of procedure, and reaches its conclusions by methods which are not subject to review or control by the courts. Its decision is final.[28]

For many years, and until a comparatively recent period in passing upon the character of lands alleged to contain coal, it pursued practically the same course and adopted the same methods applied to investigation of the character of mineral lands generally. While these rules have become in a measure, at least, obsolete or, except in rare instances, of doubtful application,

[26] *Ante*, § 13.

[26a] 37 Stats. at Large, 496.

[27] The acts of March 3, 1909 (35 Stats. at Large, 844; Comp. Stats. (Supp. 1911), p. 613; Fed. Stats. Ann. (Supp. 1909), p. 563), June 22, 1910, and April 30, 1912 (36 Stats. at Large, 583; 1 Fed. Stats. Ann. (Supp. 1912), p. 317), are printed in full in the Appendix, together with a reference to all circular instructions containing forms of application,. undertakings, etc.

[28] *Ante*, § 207.

they are of sufficient importance to be here noted. An agricultural entryman may challenge the alleged coal character of land and be unwilling to accept a limited patent with reservations, and a controversy may arise which would involve the application of some of these general rules.

These may be thus formulated with special reference to coal:—

(1) All classes of coal deposits, whether anthracite, bituminous, lignite, or cannel, are embraced within the coal land laws;[29]

(2) It must be shown that as a present fact the land is more valuable for the purpose of its coal product than for any other purpose;[30] that the substance exists therein in paying quantities,[31] or that it is sufficiently valuable to be worked as a mine.[32]

These facts must be shown by the actual production of coal,[33] or by satisfactory evidence that, taking the tract as a whole, coal exists therein in sufficient quantities to make the same more valuable for mining than for agricultural purposes.[34]

The extent of the deposit may be shown by the testimony of geological experts and practical miners, taken in connection with the actual production of coal from some portion of the tract.[35]

[29] Sickle's Min. Dec. 397.

[30] Hamilton v. Anderson, 19 L. D. 168; Commrs. of Kings County v. Alexander, 5 L. D. 126.

[31] Smith v. Buckley, 15 L. D. 321.

[32] Jones v. Driver, 15 L. D. 514.

[33] Hamilton v. Anderson, 19 L. D. 168; Commrs. of Kings County v. Alexander, 5 L. D. 126.

[34] Mitchell v. Brown, 3 L. D. 65; Savage v. Boynton, 12 L. D. 612.

[35] Rucker v. Knisley, 14 L. D. 113; United States v. Diamond Coal & Coke Co., 191 Fed. 786, 795, 112 C. C. A. 272.

In determining these facts, means of transportation cannot be taken into consideration as affecting the value of the coal shown to exist.[36]

That lands in the near vicinity,[37] or even those directly adjoining, are shown to contain coal,[38] is insufficient to establish the character of a tract upon which no coal has been developed.[39]

Mere outcroppings[40] or other surface indications will not, in the absence of proof of commercial value of the deposit, prevent the entry of such lands under the preemption or homestead laws.[41]

But it is not necessary to show actual development on each forty-acre subdivision,[42] nor upon all parts of a forty-acre tract.[43]

When, however, a conflict arises between an agricultural and coal claimant, the character of the land to the extent of the entire conflict area is involved, and, necessarily, proofs of a more specific character would be required than in the case of an *ex parte* application to enter under the coal laws.

The discovery of coal in paying quantities on land embraced within a homestead claim precludes the completion of the entry,[44] unless the entryman is willing to accept the limited patent reserving the coal to the

[36] Smith v. Buckley, 15 L. D. 321.

[37] In re Williams, 11 L. D. 462; Scott v. Sheldon, 15 L. D. 361.

[38] Commrs. of Kings County v. Alexander, 5 L. D. 126; In re Archuleta, 15 Copp's L. O. 256.

[39] See, also, Dughi v. Harkins, 2 L. D. 721.

[40] Frees v. State of Colorado, 22 L. D. 510.

[41] Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 328, 8 Sup. Ct. Rep. 131, 31 L. ed. 182.

[42] Hamilton v. Anderson, 19 L. D. 168; McWilliams v. Green River Coal Assn., 23 L. D. 127; Reed v. Nelson, 29 L. D. 615.

[43] State of Montana v. Buley, 23 L. D. 116.

[44] Harnish v. Wallace, 13 L. D. 108; Dickinson v. Capen, 14 L. D. 426; Leonard v. Lennox, 181 Fed. 760, 104 C. C. A. 296.

United States as outlined in the preceding section; but discovery after purchase, under commuted homestead entry, will not defeat the issuance of the patent.[45]

The inquiry as to the character of the land is to be addressed to the date of the final entry.[46]

The modern method of investigating the character of coal lands is essentially scientific. The mode of occurrence of coal differs from the metallic deposits, and it is not impossible to determine the quality and extent of a coal-field by comparatively slight exploration.[47] The investigation of the coal measures on the public domain is now confided to the geological survey.[48] These scientific inquiries have taken the place of the old method of ascertaining the coal character of the land, so that there is but little room for controversy over the character of this class of lands.

The rules governing the classification and disposal of coal lands may be said to be in the experimental stage. They are modified from time to time to meet conditions as they arise and as experience suggests. The control of the department over the subject is somewhat plenary, and the power to modify regulations is liberally and frequently exercised.

The latest circular on the subject bears date February 20, 1913.[49]

The classification is made by quarter-quarter sections or surveyed lots, except that for good reason classification may be made by two and one-half acre tracts or multiples thereof described as minor subdivi-

[45] Arthur v. Earle, 21 L. D. 92.

[46] Herman v. Chase, 37 L. D. 590.

[47] See quotations from Lesley's "Manual of Coal and Its Topography," in Instructions, 34 L. D. 194, 201.

[48] *Ante*, § 103.

[49] 41 L. D. 528.

sions of quarter-quarter sections or rectangular lotted tracts.

The factors entering into the classification are (a) heat value, (b) thickness, (c) depth from the surface.

The unstable character of these regulations, the frequency and facility with which they are changed, render a clear analysis at this time inadvisable. The latest instructions available at this time will be found in the Appendix. In order to arrive at a correct knowledge of the rules in force at any future date, the circular set out in full in the Appendix should be consulted and the publications of the department subsequent thereto should be examined. The same may be said of the method of valuation which is considered in a subsequent section.[50]

The prior circular on this subject may be consulted with profit as showing one of the steps in the evolution of the present rules.[51] Also Bulletin 537 of the Geological Survey, where the subject is fully discussed.

§ 497. Geographical scope of the coal land laws.— The system regulating the pre-emption and sale of coal lands has substantially the same geographical scope as the general mining laws. It is in operation wherever coal is found in the precious metal-bearing states,[52] and in Arkansas, Mississippi, Louisiana, Florida, and in certain parts of Oklahoma.[53] As heretofore noted, Alabama,[54] Michigan, Minnesota, Wis-

[50] *Post*, § 507.

[51] Instructions April 10, 1909, 37 L. D. 653; amended February 10, 1910, 38 L. D. 452.

[52] *Ante*, § 81.

[53] *Ante*, § 81, note 1, pp. 96, 113.

[54] For method of acquiring coal lands in Alabama, see Circular Instructions, 10 Copp's L. O. 54; In re Robert Lalley, 10 Copp's L. O. 55; In re Harris, 28 L. D. 90.

consin, Kansas, and Missouri[55] are excepted from the operation of the federal mining laws,[56] except as to the location of salines.[57]

The act of June 22, 1910, permitting limited patents to issue to agricultural entrymen, reserving the coal to the United States, was extended to Alabama by act of April 23, 1912, but as yet there is no law authorizing the disposal of coal in such lands.[58]

The coal land laws were extended to Alaska by act of congress approved June 6, 1900,[59] but as these laws contemplated the entry and sale of surveyed lands and as the public surveys had not been to any serious extent extended over Alaska, the law was inoperative, so far as securing government title was concerned.[60] Coal land locations were made, but the possessory rights were never recognized by the government. This act was followed by an amendatory one passed April 28, 1904,[61] which provided that any person or association of persons qualified to make entry under the coal land laws, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated in rectangular tracts containing forty, eighty, or one hundred and sixty acres with north and south boundary lines run according to the true me-

[55] *Ante*, § 20.

[56] *Ante*, § 81.

[57] *Post*, § 514a.

[58] Instructions, 41 L. D. 32.

[59] 31 Stats. at Large, p. 658; Comp. Stats. 1901, p. 1441; 1 Fed. Stats. Ann. 44; 5 Fed. Stats. Ann. 57. Instructions, 30 L. D. 368.

[60] United States v. Munday, 222 U. S. 175, 184, 32 Sup. Ct. Rep. 53, 56 L. ed. 1066; Opinion of Attorney-General, 38 L. D. 86.

[61] 33 Stats. at Large, p. 525; Comp. Stats. (Supp. 1911), p. 616; 10 Fed. Stats. Ann. 27.

ridian, by marking the four corners thereof with permanent monuments so that the boundaries thereof may be readily traced.

The act contemplated a survey to be made by a United States deputy surveyor approved by the surveyor-general for Alaska, such survey when approved to be the basis of the patent. The price of the land was fixed at ten dollars per acre. The act also provided for the determination of adverse claims on proceedings similar to other mining claims. Several groups of claims were surveyed and applied for; some of them, including the famous Cunningham claims, passed to entry in the local land office, but they were all canceled and held to be void.[61a] As all lands of this class in Alaska are now withdrawn from entry, location and filing,[62] and are not likely to be restored until congress passes new legislation providing for their disposal, the operation of the coal land laws as to Alaska is practically suspended.

On May 28, 1908, congress passed a further act[63] relative to coal land laws in Alaska, the object of which was to enable coal locators to consolidate their holdings and make entry of contiguous tracts not exceeding in the aggregate an area of two thousand five hundred and sixty acres. Some attempts were made to acquire patents under this act, but failed.[64] As yet no patents have ever been issued for any coal lands in Alaska. All entries which were ever allowed by the local officers have been canceled, the proceedings in

[61a] In re Scofield, 41 L. D. 176, 240.

[62] The date of the general withdrawal was November 12, 1906, Circular, 35 L. D. 572.

[63] 35 Stats. at Large, p. 424; Comp. Stats. (Supp. 1911), p. 617; Fed. Stats. Ann. (Supp. 1909), p. 30.

[64] See Opinion Attorney-General, 38 L. D. 86.

many, if not all of them, having been held to be the result of fraudulent conspiracies.[65]

Article II. Manner of Acquiring Title to Coal Lands.

§ 501. Who may enter coal lands.
§ 502. Different classes of entries.
§ 503. Private entry under Revised Statutes, section twenty-three hundred and forty-seven.
§ 504. Preferential right of purchase under Revised Statutes, section twenty-three hundred and forty-eight.
§ 505. The declaratory statement.
§ 506. Assignability of inchoate rights.
§ 507. The purchase price.
§ 508. The final entry.
§ 509. Conclusions.

§ 501. Who may enter coal lands.—Entries of coal lands may be made by individuals or associations of persons. In the case of an individual, he must be above the age of twenty-one years and a citizen of the United States, or he must have declared his intention to become such.[66]

Persons cannot lawfully associate themselves together to enter tracts of one hundred and sixty acres, each in severalty but to be used for the joint benefit of all in equal shares, and patents issued on entries made under such an agreement will be canceled at the suit of the United States.[67]

At one time, the department held that married women could not make entry of this class of lands.[68]

[65] See United States v. Munday, 222 U. S. 175, 184, 32 Sup. Ct. Rep. 53, 56 L. ed. 1066; reversing 186 Fed. 375; United States v. Doughten, 186 Fed. 226, 232.

[66] Rev. Stats., § 2347; 17 Stats. at Large, 607; Comp. Stats. 1901, p. 1440; 5 Fed. Stats. Ann. 55.

[67] United States v. Portland Coal & Coke Co., 173 Fed. 566, 568; United States v. Allen, 180 Fed. 855, 860. See, also, United States v. Munday, 222 U. S. 175, 184, 32 Sup. Ct. Rep. 53, 56 L. ed. 1066.

[68] In re Nichol, 15 Copp's L. O. 255.

This construction of the law, which was manifestly erroneous,[69] is no longer followed, but she is required to show that the funds with which she expects to purchase are her separate estate and that her husband has no interest in them. The department limits the exercise of this right to states in which no right or title in the wife's property vests in the husband by virtue of the marital relation.[70]

An association of persons, as the term is used in the coal land laws, is uniformly construed by the department to include corporations; but each individual of such association, whether incorporated or not, must possess the requisite qualifications. The law expressly so provides. The ownership, by one member of an association seeking to enter coal lands, of interests in other lands claimed under the coal land laws, disqualifies the entire association.[71] The right to purchase coal lands can be exercised but once.[72]

If an association of persons makes a coal entry embracing a less area than it might have applied for, such entry is a bar to a second one.[73] Where a valid reason therefor exists, such as may be instanced by a case where the applicant was unable to complete an asserted right by reason of successful adverse claims to the land sought to be entered,[74] or where the first filing was abandoned on account of the worthless char-

[69] *Ante*, § 224.

[70] In re Jessie E. Oviatt, 35 L. D. 235.

[71] In re Hawes, 5 L. D. 224; Kerr v. Utah-Wyoming I. Co., 2 L. D. 727.

[72] In re Kimball, 3 Copp's L. O. 50; In re Eiseman, 10 L. D. 539; In re Dearden, 11 L. D. 351; In re Smith, 16 Copp's L. O. 112; In re Negus, 11 L. D. 32.

[73] In re Kimball, 3 Copp's L. O. 50.

[74] In re Eiseman, 10 L. D. 539; In re Dearden, 11 L. D. 351; Conner v. Terry, 15 L. D. 310.

acter of the claim, the good faith of the entryman being apparent,[75] the cancellation of his declaratory statement would be without prejudice to a second application for other lands.

The rule applies, generally speaking, to those who have perfected their entries, or when the failure to complete the entry is the result of their own neglect.[76] The rule has no application to a case where one buys, and, prior to entry, sells a preferential right.[77] The law clearly contemplates and the land department has repeatedly held that an entry under the coal land laws must be made in good faith in the entryman's interest and not for the benefit of another.[78] An entry sought to be made by one for the benefit of a disqualified person,[79] or for one who, being originally qualified, has previously exhausted his rights,[80] or when made in the interest of a corporation or association of persons, some of whom are either disqualified or have once availed themselves of the privilege,[81] is a fraud upon the government, and may be annulled upon proper proceedings in that behalf. Contracts whereby such a result is sought to be accomplished are contrary to public policy, and therefore void.[82]

[75] In re Burrell, 29 L. D. 328.

[76] In re Hutchings, 4 Copp's L. O. 142; In re John McMillan, 7 L. D. 181; In re Smith, 16 Copp's L. O. 112.

[77] In re McConnell, 18 L. D. 414.

[78] In re Oriatt, 35 L. D. 235; United States v. Keitel, 211 U. S. 370, 390, 29 Sup. Ct. Rep. 123, 53 L. ed. 230.

[79] In re Adolph Peterson, 6 L. D. 371; Conner v. Terry, 15 L. D. 310.

[80] McGillicuddy v. Tompkins, 14 L. D. 633.

[81] United States v. Trinidad Coal & C. Co., 137 U. S. 160, 167, 11 Sup. Ct. Rep. 57, 34 L. ed. 640; United States v. Keitel, 211 U. S. 370, 390, 29 Sup. Ct. Rep. 123, 53 L. ed. 230; United States v. Forrester, 211 U. S. 399, 403, 29 Sup. Ct. Rep. 132, 53 L. ed. 245; United States v. Colorado Anthracite Coal Co., 225 U. S. 219, 32 Sup. Ct. Rep. 617, 56 L. ed. 1063; United States v. Allen, 180 Fed. 855.

[82] Johnson v. Leonard, 1 Wash. 564, 20 Pac. 591.

Parties participating in a scheme to accomplish such result may be proceeded against for criminal conspiracy under section 5440 of the Revised Statutes.[83]

But it has been decided that there is no prohibition, express or implied, in the coal land law against an entry by a qualified person for the benefit of another person or association where he or it is qualified to make entry in his own name and is not seeking to evade restrictions in respect to quantity.[83a]

An entry by an association of persons, all of whom are qualified at the date of entry, is not vitiated by the fact that at some point of time previously thereto one or more of them was disqualified.[84]

§ 502. Different classes of entries.—Coal lands are disposed of:—

(1) By ordinary private entry, under the provisions of section twenty-three hundred and forty-seven of the Revised Statutes;

(2) By pre-emption or preference right of purchase, under section twenty-three hundred and forty-eight.

The two classes of entries have the following features in common:—

(A) The persons or associations must possess the same qualifications;

(B) The minimum purchase price to be paid upon final entry is the same;

[83] United States v. Keitel, 211 U. S. 370, 393, 29 Sup. Ct. Rep. 123, 53 L. ed. 230; United States v. Forrester, 211 U. S. 399, 29 Sup. Ct. Rep. 132, 53 L. ed. 245; United States v. Wells, 192 Fed. 870, 873; United States v. Munday, 222 U. S. 175, 184, 32 Sup. Ct. Rep. 53, 56 L. ed. 1066.

[83a] United States v. Home Coal & Coke Co., 200 Fed. 910, 917; Anderson Coal Company, 41 L. D. 337.

[84] Kerr v. Utah-Wyoming Imp. Co., 2 L. D. 727; Kerr v. Carlton, 10 Copp's L. O. 255.

(C) Final entries may only be made upon surveyed lands.[85]

(D) The tracts applied for must be contiguous.[86]

§ 503. **Private entry under Revised Statutes, section twenty-three hundred and forty-seven.**—The right to enter coal lands under section twenty-three hundred and forty-seven of the Revised Statutes may be exercised upon surveyed lands without previous occupation or improvement. Necessarily, the lands sought to be entered must be vacant and otherwise unreserved and unappropriated. In other words, they must be public lands.[87] They may only be applied for by government subdivisions and in limited quantities; that is, an individual may not acquire to exceed one hundred and sixty acres, and an association of persons not to exceed three hundred and twenty acres.

To obtain title to lands under this section, the applicant is required to file with the register of the proper land office a verified application,[88] describing the lands sought to be purchased, his qualification under the law to make the entry, and such other facts as to the character and *status* of the land as will establish in the applicant a *prima facie* right of purchase. He is required to show that the lands are chiefly valuable for coal,[89] but is not required to prove that he has actually opened and improved a mine of coal on the lands applied for. This is necessary only where the applicant

[85] In re Cameron, 10 L. D. 195; In re Lyon, 20 L. D. 556.

[86] In re Masterson, 7 L. D. 172; S. C., on review, 7 L. D. 577; Kendall v. Hall, 12 L. D. 419.

[87] *Ante*, § 112.

[88] See form in Circular Instructions, 35 L. D. 669.

[89] Ghost v. United States, 168 Fed. 841, 845, 94 C. C. A. 53.

asserts a preference right of entry, a subject discussed in the following sections.[90]

If the land is clear on the tract-books, the register certifies the fact to the receiver, and the price is determined according to the rule announced in a subsequent section.[91]

Payment must then be made, whereupon the final certificate is issued, and in due time the patent follows.

Private entry will not be allowed so as to embrace one tract in the capacity of an assignee, and another under the individual right of the purchaser.[92]

Until application is made to enter and purchase under this section, the claimant has no right which is worthy of recognition. His possession, if he has any, must yield to one who complies with the law and files upon the land.[93]

§ 504. Preferential right of purchase under Revised Statutes, section twenty-three hundred and forty-eight. In order to exercise the preferential right of purchase granted by section twenty-three hundred and forty-eight, there are two essential prerequisites:—

(1) The applicant must be in the actual possession of the lands applied for;[94]

(2) He must, prior to final entry, have opened and improved the mines situated thereon.[95]

[90] McKibben v. Gable, 34 L. D. 178; Lehmer v. Carroll, 34 L. D. 267; S. C., on review, 34 L. D. 447.

[91] *Post*, § 507.

[92] In re Ludlam, 17 L. D. 22.

[93] Leheart v. Dunker, 4 L. D. 522.

[94] In re Negus, 11 L. D. 32; Walker v. Taylor, 23 L. D. 110; McDaniel v. Bell, 9 L. D. 15; McKibben v. Gable, 34 L. D. 178.

[95] Walker v. Taylor, 23 L. D. 110; Ouimette v. O'Connor, 22 L. D. 538; McKibben v. Gable, 34 L. D. 178.

The improvements made must be such as to clearly indicate good faith.[96]

A perfunctory compliance with the law in this respect will not suffice, but a mine or mines of coal must in fact be opened and improved on the land claimed.[97]

A mere penetration of a bed of coal by means of a drill so small that the work cannot be utilized in the mining of coal from the land is not in itself the opening and improving of a mine or mines thereon within the contemplation of the statute, and a preference right of entry is not thereby acquired.[98]

The projection of underground workings from privately owned ground into an adjoining tract of public land with a view to extracting coal therefrom, such being the only feasible and practical method of opening up and mining the coal from such adjoining tract, followed immediately by the execution and filing of a declaratory statement giving notice of the extent of the coal lands claimed, constitutes the opening and improving of a mine within the meaning of the coal land laws.[99]

In determining what constitutes good faith, the applicant's degree and condition in life may be considered.[100]

Priority of possession and improvement, followed by proper filing and development of the mine in good faith, are the foundation of the preferential right.[1]

The right to purchase coal lands is initiated by the actual discovery of coal on the land and the per-

[96] In re Negus, 11 L. D. 32.
[97] In re Filer, 36 L. D. 360.
[98] In re Thad. Stevens, 37 L. D. 723.
[99] Carthage Fuel Company, 41 L. D. 21.
[100] Watkins v. Garner, 13 L. D. 414.
[1] Bullard v. Flanagan, 11 L. D. 515.

formance of some act of improvement sufficient to give notice to the world of an intent to purchase such lands as coal lands. The right to purchase such lands cannot be initiated by the filing of a declaratory statement therefor.

In case of conflicting claims to coal lands, the preference right is determined not by the date of the filing of the declaratory statement . . . . but by priority of possession and improvement.[2]

This right may be exercised by an individual or an association of persons. When exercised by an individual, it is limited to one hundred and sixty acres, and when by an association of persons, ordinarily to three hundred and twenty acres. Entries by associations consisting of not less than four persons may, however, be extended to six hundred and forty acres, after they shall have expended not less than five thousand dollars in working and improving such mines.

The expenditure of five thousand dollars required by section 2348 of the Revised Statutes to be made by an association of four or more qualified persons seeking to acquire title to six hundred and forty acres of coal lands is a condition precedent to the *right* to *enter*, but not a condition precedent to the right to file a declaratory statement. A qualified association upon opening and improving a mine accompanied by actual possession and filing a declaratory statement becomes possessed of the right to assert exclusive claim to six hundred and forty acres of coal lands; and by thereafter seasonably expending five thousand dollars in working and improving the mine, becomes invested with the right to apply for, pay for and enter such lands.[3]

[2] Reed v. Nelson, 29 L. D. 615, 619.

[3] Carthage Fuel Company, 41 L. D. 21.

The preferential right may be initiated by entering into possession and improving unsurveyed lands.[4] The right, however, may only be perfected after the lands shall have been surveyed and the township plat filed in the local land office.[5]

§ 505. The declaratory statement.—If the preferential right is initiated upon surveyed lands, the claimant must present to the register of the proper land office, within sixty days[6] after the date of actual possession, and the commencement of improvements upon the land, his declaratory statement of the facts upon which he bases his right.

The preferential right is not created or initiated by the filing of this statement. It is acquired only by opening and improving and having possession of a mine or mines of coal on the public lands. In the absence of either of the required conditions, there is no preferential right of entry under the statute. The office of the declaratory statement is to preserve the right, not to create it. If the right does not exist, the declaratory statement has no office to perform.[7]

While in possession and engaged in development the claimant has a right to sell such coal as is encountered and removed in the development working.[8]

4 Holladay Coal Co. v. Kirker, 20 Utah, 192, 57 Pac. 882.

5 Under section 2401 of the Revised Statutes as amended August 20, 1894 (28 Stats. at Large, 423; Comp. Stats. 1901, p. 1477; 6 Fed. Stats. Ann. 375), parties possessed of coal lands which are unsurveyed may expedite the survey by application to the surveyor-general and making a deposit to cover costs.

6 In re Morrison, 36 L. D. 126; S. C., on review, 36 L. D. 319.

7 McKibben v. Gable, 34 L. D. 178; Lehmer v. Carroll (on review), 34 L. D. 447; In re Morrison, 36 L. D. 126; S. C., on review, 36 L. D. 319; In re Stevens, 37 L. D. 723; Conway v. Brooks, 39 L. D. 337.

8 Ghost v. United States, 168 Fed. 841, 846.

Where the lands upon which the right is initiated by occupation and development are unsurveyed, the time within which the declaratory statement is to be filed commences to run from the date the approved township plat is received at the local land office.[9]

Failure to file this instrument within the time specified renders the land subject to entry by another, if he has complied with the law;[10] but in the absence of an adverse claimant, the right to complete the entry is not forfeited.[11]

A second filing for the same tract will not be allowed to one who has failed to comply with the law in the first instance.[12]

The statement must be verified by the oath of the applicant. This duty cannot be delegated to others;[13] but after the same is filed, the subsequent acts required to complete the entry may be performed by a duly authorized agent, acting under a power of attorney.[14]

§ 506. Assignability of inchoate rights.—An inchoate right or privilege flowing from an accepted application or declaratory statement may be assigned to one who possesses the necessary legal qualifications;[15]

9 Rev. Stats., § 2439; 17 Stats. at Large, 607; Comp. Stats. 1901, p. 1440; 5 Fed. Stats. Ann. 56.

10 Brennan v. Hume, 10 L. D. 160; O'Gorman v. Mayfield, 19 L. D. 522.

11 In re Grunsfeld, 10 L. D. 508; In re Morrison (on review), 36 L. D. 323.

12 Id.

13 White Oaks Imp. Co., 13 Copp's L. O. 159; In re Hallowell, 2 L. D. 735.

14 Rose v. Dineen, 26 L. D. 107.

For forms of declaratory statements, and the manner of procedure generally, see the Coal Land Circular Instructions, which appear in full in the Appendix.

15 Kerr v. Carlton, 10 Copp's L. O. 255; Guillet v. Durango Land & Coal Co., 26 L. D. 413; par. 37, Circular Instructions (Coal Lands). See Appendix.

but such assignment, if the assignee perfects the entry, would extinguish the right of both parties to purchase lands under the coal land laws, and both would thereafter be disqualified from making further entries. However, the sale of an option to purchase, which is not taken advantage of, does not disqualify a claimant to enter coal land.[16]

Where such assignments are made, the purchaser may avail himself of the improvement and development of his assignor.

§ 507. **The purchase price.**—Under section twenty-three hundred and forty-seven of the Revised Statutes, the *minimum* price fixed by law to be paid for coal lands depends upon the situation of the land with respect to completed railroad.[17]

If within fifteen miles of such road, the entryman must pay at the rate of not less than twenty dollars per acre. If more than fifteen miles, not less than ten dollars per acre. The distance from the road (not the distance from the nearest shipping-point) is the test.[18]

The *status* of the land at the date of final proof and payment, with respect to this distance, determines the minimum price thereof, irrespective of the *status* when the preference right is initiated or acquired.[19]

Where the land lies partly within fifteen miles and in part outside such limit, the maximum price must be paid for all legal subdivisions, the greater part of which lie within fifteen miles of such road.

16 Reed v. Nelson, 29 L. D. 615.

17 In re Foster, 2 L. D. 730.

18 In re Conant, 29 L. D. 637.

19 In re Colton, 10 L. D. 422; In re Largent, 13 L. D. 397; In re Burgess, 24 L. D. 11.

The term "completed railroad" is construed by the department to mean one which is actually constructed on the face of the earth.

For many years, in fact, until July, 1906, it was the practice to dispose of coal lands at these minimum prices, regardless of the quality of the deposit or its market value.[19a] Since that date lands which have been classified and valued have been disposed of at fixed prices based upon the value of the coal contained in the land. On July 26, 1906, large areas known or supposed to contain coal were withdrawn from entry and this withdrawal was followed by others. At the same time the geological survey began an appraisement of these withdrawn lands, which were returned to entry as rapidly as they were classified and appraised. At the time this policy was established the geological survey had examined only a very small part of the coal-fields in the public land states. From that time, however, the examination of coal lands was increased until it became necessary, in order to unify and correlate the work, to create a board of three members, known as the land classification board, who should prepare or revise all classifications made. The work of this board resulted in the "Regulations on the Classification and Valuation of Coal Lands," approved by the secretary of the interior, April 10, 1909.[20]

[19a] In re Plisted, 40 L. D. 610.

[20] 37 L. D. 653 (amended 38 L. D. 452). We are indebted for this statement to the contributions of Mr. Geo. H. Ashley, "The Value of Coal Land," and of Mr. Cassius A. Fisher, "Depth and Minimum Thickness of Beds as Limiting Factors in Valuation," comprising Bulletin 424 of the United States Geological Survey. These reports are of the highest scientific and economic value. They explain the reasons upon which classifications are based, the factors which enter into valuation, and other details which are highly instructive.

As we have heretofore pointed out,[21] methods of classification and valuation of coal lands are prescribed from time to time by the department of the interior, the departmental regulations being subject to change as experience suggests. The latest regulations on the subject will be found in the appendix, and are contained in circular issued February 20, 1913.[22] Briefly stated, valuations are arrived at by a consideration of the following elements among others: (a) thickness, (b) heat units, (c) character of coal, i. e., coking, smokeless, or anthracite or other enhancing qualities, with deductions for impurities, (d) proximity to railroads with maximum limit of three hundred dollars per acre, except in districts which contain large coal mines, where the character and extent of the coal are well known.[23]

Every individual case must be dealt with according to its own peculiarities and environment. Valuations made at one time may be changed at another.

It will thus be seen that factors which enter into the method of valuing coal deposits for purposes of sale by the government are numerous. Mr. Ashley, in Bulletin No. 424 of the Geological Survey,[24] states that—

> Among the factors affecting the price of coal land are the character and amount of coal, competition, knowledge of coal content, accessibility, cost of mining and marketing, demand, and artificial and legal restrictions. Each of these factors in turn is composed of many elements.

[21] *Ante*, § 496.

[22] 41 L. D. 528.

[23] Mr. Ashley notes government valuations in Wyoming ranging from three hundred and seventy dollars to four hundred and ten dollars and from two hundred and twenty-five dollars to four hundred and thirty dollars per acre. Bulletin, 424, p. 45.

[24] Page 15. Attention is also called to Bulletin 537 of the Geological Survey, where the subject is fully discussed.

§ 508. **The final entry.**—Within the time fixed by the law, i. e., one year from filing the declaratory statement, the claimant must make his application to purchase, and submit proof showing compliance with the law. If there is no opposition, he is permitted to make entry and payment. If there are protests or adverse claims, a hearing is had, and the rights determined within the department.

§ 509. **Conclusions.**—It will be observed that the nature of the inchoate estate created by compliance with the coal laws bears a striking analogy to that conferred by the former agricultural pre-emption act. The same analogy exists as to proceedings to acquire the title.

The only feature in common between the coal land system and the general mining laws is, that in both discovery is required as a condition precedent to the acquisition of title.

The extralateral right has no place in the coal laws. Although many coal veins occupy a more or less inclined position, the only class of entries allowed is by government subdivisions, and the entryman obtains title only to whatever lies within vertical planes drawn through his surface boundaries.

In the case of mining claims, certain prescribed work must be performed annually in order to perpetuate the estate acquired by location. A locator need never apply for a patent. Under the coal laws, no particular amount of expenditure is required, except where an association of not less than four persons seeks to enter six hundred and forty acres, it is required that they must produce proof of improvements to the extent of five thousand dollars. A patent must be applied for within a year from the filing of the declaratory state-

ment, in case of preferential rights, under section twenty-three hundred and forty-eight of the Revised Statutes. In the case of private entries under section twenty-three hundred and forty-seven, the first step is the application for patent.

CHAPTER VI.

SALINES.

§ 513. Governmental policy with reference to salines.
§ 514. The act of January 12, 1877—Territorial limit of its operation.
§ 514a. The act of January 31, 1901.
§ 515. What embraced within the term "salines."

§ 513. Governmental policy with reference to salines.—Salt is essentially a mineral,[1] and salt lakes and salt springs legitimately fall within the designation of mineral substances.[2]

Prior to the passage of the act of January 31, 1901, to be hereafter referred to, lands of this character were classed by themselves, and were not subject to entry under any law operative throughout the public land states. The policy of the government since the acquisition of the Northwest territory and the inauguration of the federal land system, and until the passage of the act referred to, had been to reserve salines and salt springs from sale.[3] The object of this reservation was to preserve them for future states. A brief reference to the legislation in this behalf may be of historical value.

[1] Garrard v. Silver Peak Mines, 82 Fed. 578, 589; S. C., on appeal, 94 Fed. 983, 36 C. C. A. 603; Eagle Salt Works, Copp's Min. Lands, 336.

[2] State v. Parker, 61 Tex. 265.

[3] Morton v. State of Nebraska, 21 Wall. 660, 22 L. ed. 639, 12 Morr. Min. Rep. 541; Salt Bluff Placer, 7 L. D. 549; Cole v. Markley, 2 L. D. 847; Southwestern M. Co., 14 L. D. 597; Garrard v. Silver Peak Mines, 82 Fed. 578; S. C., on appeal, 94 Fed. 983, 36 C. C. A. 603; In re Geissler, 27 L. D. 515; Oklahoma Territory v. Brooks, 29 L. D. 533; In re Territory of New Mexico, 31 L. D. 389; Hall v. Litchfield, Copp's Min. Lands, 333; Utah Salt Lands, 13 Copp's L. O. 53; Territory of New Mexico, 35 L. D. 1.

§ 514. The act of January 12, 1877—Territorial limit of its operation.—The act of Jaunary 12, 1877,[4] was the first to make provision for the general disposition of lands containing salt springs and deposits The act marked a departure from the government's policy of reservation from sale of this class of lands.

Prior to that date many states received grants of salt springs. Among these we note Ohio,[5] Indiana,[6] Alabama,[7] and Illinois.[8] Under the acts providing for the admission of Missouri,[9] Arkansas,[10] Michigan,[11] Iowa and Florida,[12] Wisconsin,[13] Minnesota,[14] Kansas,[15] Oregon,[16] Nebraska[17] and Colorado,[18] each of these states received a grant of salt springs with lands adjoining them.

Prior to the act of 1901, there was no authority for the disposal of lands chiefly valuable for their salt deposits or salt springs belonging to the United States. except the act of January 12, 1877.[19]

4 19 Stats. at Large, 221.
5 2 Stats. at Large, 173.
6 3 Stats. at Large, 289.
7 3 Stats. at Large, 489.
8 3 Stats. at Large, 428.
9 3 Stats. at Large, 545.
10 5 Stats. at Large, 58.
11 5 Stats. at Large, 59.
12 5 Stats. at Large, 789.
13 9 Stats. at Large, 56.
14 11 Stats. at Large, 166.
15 11 Stats. at Large, 269.
16 11 Stats. at Large, 383; State of Oregon v. Jones, 24 L. D. 116.
17 13 Stats. at Large, 47.
18 18 Stats. at Large, 474; State of Colorado, 10 L. D. 222. For list of states admitted prior to 1877, see Hall v. Litchfield, 2 Copp's L. O. 179.
19 Hall v. Litchfield, Copp's Min. Lands, 333; Salt Bluff Placer, 7 L. D. 549; Southwestern M. Co., 14 L. D. 597; In re Geissler, 27 L. D. 515.

This act[20] provided for their sale at public auction at not less than one dollar and twenty-five cents per acre, or at private sale at the same minimum rate, in the event sales were not effected at public auction; but the operation of the act was confined to states which have had grants of salines which have been fully satisfied, or under which the right of selection might expire by efflux of time. The act, therefore, did not apply to the then territories;[21] nor did it apply to Mississippi, Louisiana, California, Nevada,[22] North and South Dakota, Montana, Washington, Idaho, Utah, or Wyoming, none of which had theretofore received a grant of such lands. Under act of June 21, 1898,[23] all saline lands within the territory of New Mexico were granted to the territory.[24] But this grant was repealed on the admission of the territory into the Union, which act also reserved all salines to await further congressional action.[25] On Utah's admission that state received a grant, among others, of one hundred and ten thousand acres to be selected and located as provided and including all the saline lands in said state. The supreme court of Utah held that this grant conveyed all the saline lands in addition to the one hundred and ten thousand acres.[26] The supreme court of the United States reversed this ruling and held the saline lands

[20] 19 Stats. at Large, p. 221; Comp. Stats. 1901, p. 1547; 5 Fed. Stats. Ann. 48.

[21] Utah Salt Lands, 13 Copp's L. O. 53; Circular Instructions, Apr. 10, 1877, 4 Copp's L. O. 21; In re Geissler, 27 L. D. 515; Oklahoma Territory v. Brooks, 29 L. D. 533.

[22] Southwestern M. Co., 14 L. D. 597; Public Domain, 696.

[23] 30 Stats. at Large, 484; 6 Fed. Stats. Ann. 482.

[24] Territory of New Mexico, 35 L. D. 1.

[25] 36 Stats. at Large (part 1), p. 562; § 18, p. 568; Comp. Stats. (Supp. 1911), p. 659; 1 Fed. Stats. Ann. (Supp. 1912), p. 367.

[26] State of Utah v. Montello Salt Co., 34 Utah, 458, 98 Pac. 549, 551.

intended to be transferred and selected were included in the one hundred and ten thousand acres.[27]

The act of January 12, 1877, however, has been superseded by the act of January 31, 1901, which inaugurated a distinct change of policy.

§ 514a. **The act of January 31, 1901.**—On January 31, 1901, congress enacted the following law:—

> That all unoccupied lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer mining claims; *provided*, that the same person shall not locate or enter more than one claim hereunder.[28]

Upon the passage of this act, the secretary of the interior promulgated the following circular instructions:—

> 1. Under this act the provisions of the law relating to placer-mining claims are extended to all states and territories and the district of Alaska, so as to permit the location and purchase thereunder of all unoccupied public lands containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, with the proviso, "That the same person shall not locate or enter more than one claim hereunder."
>
> 2. Rights obtained by location under the placer mining laws are assignable and the assignee may make the entry in his own name; so, under this act, a person holding as assignee may make entry in his own name,—*provided*, he has not held under this act, at any time, either as locator, assignee or entryman, any other lands; his right is exhausted by having held under this act any particular tract, either as

[27] Montello Salt Co. v. Utah, 221 U. S. 452, 453, 31 Sup. Ct. Rep. 706, 55 L. ed. 810.

[28] 31 Stats. at Large, p. 745; Comp. Stats. 1901, p. 1435; 5 Fed. Stats. Ann. 48.

locator, assignee, or entryman, either as an individual or as a member of an association. It follows, therefore, that no application for patent or entry, made under this act, shall embrace more than one single location.

3. In order that the conditions imposed by the proviso, as set forth in the above paragraph, may duly appear, the notice of location presented for record, the application for patent, and the application to purchase must each contain a specific statement under oath by each person whose name appears therein that he never has, either as an individual or as a member of an association, located, applied for, entered, or held any other lands under the provisions of this act. Assignments made by persons who are not severally qualified as herein stated will not be recognized.[29]

Henceforward, except in the state of New Mexico, where, by the act admitting it into the Union, saline lands were reserved for future congressional action,[30] the general mining laws applicable to the discovery and location of placers apply, with one marked exception, that the same person may not locate nor enter more than one claim, thus placing the location of salt lands in this behalf on the same plane with coal and homestead entries. The right to locate is exhausted by the entry of an individual claim. The rules in this regard with reference to coal land apply by analogy to some extent at least.

This act would from its phraseology seem to be operative in the states which have heretofore been excepted from the operation of the general mining laws,—viz., Michigan, Minnesota, Wisconsin, Missouri, Kansas and Alabama.[31] In other words, the

[29] 31 L. D. 131.

[30] *Ante*, § 514.

[31] *Ante*, § 75.

general mining laws, so far as they are applicable to the appropriation of saline lands, are in force in all the public land states enumerated in a previous section,[32] except New Mexico, wherein there are unoccupied public lands of the United States containing salt springs or deposits of salt in any form.

§ 515. What embraced within term "salines."— Although different acts of congress dealing with saline lands contain different phraseology, the terms are interchangeable, and were intended to embrace the same quality of land.

The lands falling within these interchangeable terms are thus defined by the secretary of the interior:—

> Congress had in contemplation throughout merely common salt or chloride of sodium in its various forms of existence or deposit, and that only lands containing commercially valuable quantities thereof are intended to be included.[33]

Deposits of rock salt fall within the designation of salines, as do salt springs, from which salt for table or other economic use is obtained,[34] and salt beds,[35] although Commissioner McFarland entertained the view that a *ledge* of rock salt might be located under the lode laws.[36]

This we think would now be the rule[37] were it not for the express language of the statute which pro-

[32] *Ante*, § 20. Circulars, Nov. 14, 1901, 31 L. D. 130, 131.

[33] Territory of New Mexico, 35 L. D. 1; Lovely Placer Claim, 35 L. D. 426.

[34] Lovely Placer Claim, 35 L. D. 426.

[35] Southwestern M. Co., 14 L. D. 597.

[36] In re Megarrigle, 9 Copp's L. O. 113.

[37] *Ante*, § 323.

vides for the location of salt deposits under the provisions of the law applicable to placers.[38]

As to other so-called mineral springs, Secretary Noble expressed an opinion, which is probably a mere *dictum*, that they also should be classified as salines;[39] but Secretary Teller ruled that lands containing mineral springs not of a saline character are subject to sale under the agricultural land laws.[40]

Sulphur springs are not regarded as saline.[41]

Tracts of land returned by the surveyor-general as saline may be shown to be agricultural in character, and will then be subject to entry under the agricultural land laws.[42] In other words, the return of the surveyor-general concludes no one.[43]

The act of January 31, 1901, provides that salt springs, or *deposits of salt in any form*, and chiefly valuable therefor, are subject to appropriation as placers.[44] This means, of course, common salt or deposits from which chloride of sodium for table or economic use is obtained. This class of deposits is excepted from the operation of railroad land grants.[45]

[38] *Ante*, § 514a.

[39] Southwestern M. Co., 14 L. D. 597.

[40] Pagosa Springs, 1 L. D. 562. See, also, Morrill v. Margaret M. Co., 11 L. D. 563.

[41] Commissioner's Letter, Copp's Min. Dec. 22.

[42] Cole v. Markley, 2 L. D. 847.

[43] *Ante*, § 106.

[44] 31 Stats. at Large, p. 745; Comp. Stats. 1901, p. 1435; 5 Fed. Stats. Ann. 48.

[45] Elliott v. Southern Pacific R. R., 35 L. D. 149.

CHAPTER VII.

MILLSITES.

§ 519. The law relating to millsites.
§ 520. Different classes of millsites.
§ 521. Right to millsite—How initiated.
§ 522. Location of millsite with reference to lode.
§ 523. Nature of use required in case of location by lode proprietor.
§ 524. Millsites used for quartz-mill or reduction works disconnected with lode ownership.
§ 525. Location of junior lode claims conflicting with senior millsites.

§ 519. The law relating to millsites.—Millsites, while they are frequently important accessions to mining rights, occupy a relatively subordinate position in the federal mining system. Prior to the passage of the mining laws, they, in common with many other privileges asserted on the public domain, were regulated exclusively by neighborhood customs and local rules, not necessarily under the name of millsites, but as surface adjuncts to located lodes.

Until the act of May 10, 1872, was passed there was no law by which title to them could be obtained. Section fifteen of that act provides a method, which is perpetuated in section twenty-three hundred and thirty-seven of the Revised Statutes. This section is as follows:—

> Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of

such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction works not owning a mine in connection therewith may also receive a patent for his millsite, as provided in this section.

§ 520. **Different classes of millsites.**—It will thus be observed that the law divides patentable millsites into two classes:—

(1) Such as are used and occupied by the proprietor of a vein or lode for mining or milling purposes;

(2) Such as have thereon quartz-mills or reduction works, the ownership of which is disconnected with the ownership of a lode or vein.[1]

The limit as to area and price per acre is the same in both classes, and the requirement that the lands embraced therein shall be nonmineral applies equally to each class.

With reference to the number of millsites one may locate in connection with the ownership of a number of lode claims, the popular impression for a long time obtained that for each lode claim, contiguous or noncontiguous, the lode claimant was entitled to a millsite, and it is quite common to find a series of five-acre tracts located side by side as millsites equal in number to the claims owned. As to this practice the land department thus states its views:—

> The manifest purpose of the first clause of the section is to permit the proprietor of a lode mining claim to acquire a small tract of noncontiguous nonmineral land as directly auxiliary to the prosecution of active mining operations upon his lode

[1] Rico Townsite, 1 L. D. 556; Hartman v. Smith, 7 Mont. 19, 14 Pac. 648; Hamburg M. Co. v. Stephenson, 17 Nev. 449, 30 Pac. 1088.

claim or for the erection of quartz-mills or reduction works for the treatment of the ore produced by such operation. The area of such additional tract is by the terms of the statute restricted to five acres as obviously ample for either purpose. The logical inference is that the millsite provision is intended solely to subserve a recognized practical necessity contemplating an accession for specified purposes to acquired mining rights, and is not a provision for the acquisition of merely additional superficies in connection with each lode location. Whilst no fixed rule can well be established, it seems plain that ordinarily one millsite affords abundant facility for the promotion of mining operations upon a single body of lode claims. There is nothing in the language or reason of the statute to permit a millsite to be taken and acquired in connection with each mining claim of a group. A separate millsite cannot, therefore, be regarded or allowed as complementary to each lode claim in a group.[2]

The application for patent which induced this expression of opinion was one in which the owner of eighteen lode claims had located eighteen millsites around two arms of a horseshoe formed by the navigable waters of Copper Harbor, an inlet of the North Pacific Ocean, Alaska. None of the millsites were actually used for any purpose.

There can be but little exception taken to the general rule stated in the above-quoted decision. It is manifest that where the owner of a group of lode claims of such a nature and so situated that a larger area than a single millsite is reasonably necessary for the proper and convenient working of the claims and the reduction and treatment of the ores, there is no disposition in the land department to limit the

[2] Alaska Copper Co., 32 L. D. 128.

area to a single millsite. The department will deal with each case according to its reasonable necessities, only insisting that if more than one millsite is applied for in connection with a group of lode claims, a sufficient and satisfactory reason therefor must be shown.[3]

It has been held that a lode proprietor may select more than one tract if the aggregate does not exceed five acres,[4] provided, of course, that each tract is used for mining and milling purposes in connection with the lode.

There is no provision of law by which a millsite can be acquired as additional to, or in connection with, an existing millsite.[5]

§ 521. Right to millsite — How initiated. — The statute is silent as to the manner of locating millsites, but it is not unreasonable to suppose that a location thereof must be made substantially as that of a mining claim.[6] This is the universal practice throughout the mining regions, and this practice is recognized by the land department[7] and the courts.[8]

Some of the states have enacted laws prescribing the manner of locating millsites. California,[9] Montana,[10] Nevada,[11] and Utah[12] have passed laws pro-

[3] Hard Cash and Other Millsite Claims, 34 L. D. 325, 327.

[4] In re J. B. Haggin, 2 L. D. 755.

[5] Hecla Consolidated M. Co., 12 L. D. 75.

[6] Rico Townsite, 1 L. D. 556.

[7] Hargrove v. Robertson, 15 L. D. 499; In re George, 2 Copp's L. O. 114.

[8] Hartman v. Smith, 7 Mont. 19, 14 Pac. 648.

[9] Civ. Code, §§ 1426j, 1426k.

[10] Rev. Pol. Code, 1895, §§ 3610, 3612; Laws 1907, p. 18; Rev. Code 1907, § 2285.

[11] Comp. Laws 1900, §§ 222–225; Rev. Laws 1912, §§ 2436, 2439.

[12] Laws 1899, p. 26, §§ 2, 3, 4, 10; Comp. Laws 1907, § 1497.

viding for the posting and recording of notices; California, Nevada and Utah also requiring the boundaries to be marked, the first two states with the same formality as in the case of placer claims, and the latter so that the boundaries thereof can be readily traced.

The mere location of a millsite does not of itself segregate the land from the body of the public domain. A right to be recognized must be based upon possession and use.[13]

Where the land is not in actual use, the claimant must show such an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining and milling purposes.[14]

Mere intention or purpose on a certain contingency of performing acts of use or occupation thereon will not satisfy the law.[15]

It is unnecessary to remark that the tract sought to be obtained for millsite purposes must not only be nonmineral,[16] but it must also be upon the unoccupied, unreserved, and unappropriated domain. As lands not mineral in character may be selected under various laws, the right to appropriate them for millsite purposes cannot be exercised if any lawful possession is held by others. Therefore, millsites may not be selected on lands within the limits of railroad grants after the line of the road has been definitely fixed,[17]

[13] Rico Townsite, 1 L. D. 556.

[14] Two Sisters Lode and Millsite, 7 L. D. 557; In re Lenning, 5 L. D. 190.

[15] Ontario S. M. Co., 13 Copp's L. O. 159.

[16] Rico Townsite, 1 L. D. 556; Alta Millsite, 8 L. D. 195; Patterson Quartz Mine, 4 Copp's L. O. 3; Copp's Min. Dec. 129; Cleary v. Skiffich, 28 Colo. 362, 89 Am. St. Rep. 207, 65 Pac. 60, 21 Morr. Min. Rep. 284.

[17] Mongrain v. N. P. R. R., 18 L. D. 105, Copp's Min. Dec. 147.

nor within the limits of any valid, subsisting agricultural or other holding. As between millsite and agricultural claimants, the rights of the parties are determined by priority of possession.[18]

In Alaska the boundary line of a millsite cannot approach within sixty feet of tide water, i. e., the line of ordinary high tide.[19] When patent for a millsite is applied for, the character of the land is to be determined as of the date of the application, not the date of the location. If shown to be mineral at the time patent is applied for, no patent can issue.[20]

§ 522. Location of millsite with reference to lode. The statute provides that a millsite should not be contiguous to the *lode*. Whether this should be construed to interdict a location of a millsite adjoining a boundary of a *lode claim* has been the subject of discussion by the department with varying results.

It has been held that a millsite must be nonadjacent to the *lode claim*. In other words, there must be appreciable space intervening between the boundaries of a lode claim and a millsite.[21] This rule, however, no longer obtains. The later decisions sanction the location of a millsite adjacent to a side-line of a lode claim,[22] also to an end-line, although in the latter case a higher degree of proof would be required to establish the nonmineral character of the land than would otherwise be required,[23] owing to the presumption, at

[18] Sierra Grande M. Co. v. Crawford, 11 L. D. 338; Adams v. Simmons, 16 L. D. 181; In re Moore, 11 Copp's L. O. 326.

[19] Act of May 14, 1898, sec. 10; 30 Stats. at Large, 409, 413; Comp. Stats. 1901, p. 1469; 1 Fed. Stats. Ann. 50.

[20] Reed v. Bowron, 32 L. D. 383.

[21] Alaska Copper Co., 32 L. D. 128; Brick Pomeroy Millsite, 34 L. D. 320; Open Door Lode & Millsite (unreported).

[22] Yankee Millsite, 37 L. D. 674.

[23] In re Anna Dillon, 40 L. D. 84.

least for executive purposes, that the lode traverses the claim from end to end.[24] Evidence to overcome this presumption would therefore be necessary.

As the character of the land is always a question of fact, if it should be determined that the tract contiguous to the end-lines is in fact nonmineral, there is no objection to appropriating it for millsite purposes.[25] This was originally the rule followed by the land department, and is now confirmed by the latest decisions of that tribunal as above noted, the intermediate decisions to the contrary having been overruled.

§ 523. Nature of use required in case of location by lode proprietor.—The statute does not mention any particular mining purpose for which a millsite, selected by a lode proprietor, shall be used. If used in good faith for any mining purpose at all in connection with a quartz lode, such use would be within the meaning of the statute.[26]

A millsite is required to be used or occupied distinctly for *mining* or *milling* purposes in connection with the lode claim with which it is associated. The requirement of the statute plainly contemplates a function or utility intimately associated with the removal, handling or treatment of the ore from the vein or lode. Some step in or directly connected with the process of *mining* or some feature of milling must be performed upon, or some recognized agency of operative mining or milling must occupy, the millsite at

[24] *Ante*, § 366.

[25] National Mining and Exploring Co., 7 Copp's L. O. 179; In re Long, 9 Copp's L. O. 188.

[26] Hartman v. Smith, 7 Mont. 19, 14 Pac. 648, 650; Silver Peak Mines v. Valcalda, 79 Fed. 886; S. C., on appeal, 86 Fed. 90, 93.

the time the patent therefor is applied for to come within the purview of the statute.[27]

The erection on the tract of a cabin, using the same for storage of tools and supplies, and ores in small quantities, has been held to be within the intent of the law.[28] But this ruling has not been extended so as to include the construction and maintenance of a boarding-house, store, sawmill or wharf.[29]

It has been said that using land for deposit of tailings,[30] or storing ores, or for shops or houses for workmen;[31] for collecting water to supply motive power for a quartz-mill,[32] or for pumping works,[33] or for obtaining water for use in developing the mine,[34] might be considered proper uses in connection with a located lode, provided that the millsite was used for such purposes at the time patent was applied for, mere availability for such use or intention to use in the future being insufficient.[35] The storage of ore on four separate millsites claimed in connection with as many lode claims would not authorize the entry of four millsites unless it were shown that all the ore could not be stored on one of them.[36]

Land cannot be entered as a millsite simply because it has timber growing thereon, which is valuable

[27] Alaska Copper Co., 32 L. D. 128, 131; Hard Cash Millsite, 34 L. D. 325.

[28] Id. See, also, Eclipse Millsite, 22 L. D. 496.

[29] Alaska Copper Co., 32 L. D. 128.

[30] Ritter v. Lynch, 123 Fed. 930, 933.

[31] Satisfaction Extension Millsite, 14 L. D. 173; In re Lenning, 5 L. D. 190.

[32] Id. But see, *contra*, Peru Lode and Millsite, 10 L. D. 196.

[33] Sierra Grande M. Co. v. Crawford, 11 L. D. 338.

[34] Gold Springs and Denver City Millsite, 13 L. D. 175. See Silver Star Millsite, 25 L. D. 165; Valcalda v. Silver Peak Mines, 86 Fed. 90, 93.

[35] Hard Cash Millsite, 34 L. D. 325.

[36] Hard Cash Millsite, 34 L. D. 325.

for use on a located lode claim,[37] although the millsite locator may cut the timber growing on the millsite for the purpose of constructing his mill thereon.[38]

The department has permitted the entry of ground for dumpage purposes in tracts of greater area than five acres,[39] on the theory that it was necessary for use in connection with mining, the land being more valuable for that purpose than any other; but this seems to us an unwarranted interpretation of the law.

If ground on which tailings are deposited may be entered as a millsite, dumpage grounds may also be entered for like reasons. It is quite clear that unless they may be entered under the millsite laws for this purpose, they cannot be entered at all.[40]

The fact that the lode claim in connection with which the millsite is used is patented is immaterial. A millsite may be appurtenant to a patented as well as an unpatented claim, and patent for the millsite may subsequently be applied for separately.[41]

§ 524. Millsites used for quartz-mill or reduction works disconnected with lode ownership.—The right to patent a millsite under the last clause of section twenty-three hundred and thirty-seven of the Revised Statutes depends upon the existence on the land of a quartz-mill or reduction works.[42]

37 Two Sisters Lode and Millsite, 7 L. D. 557.

38 In re Page, 1 L. D. 614.

39 4 Copp's L. O. 102.

40 See In re Burton, 29 L. D. 235.

41 Eclipse Millsite, 22 L. D. 496.

42 In re Lenning, 5 L. D. 190; In re Cyprus Millsite, 6 L. D. 706; Two Sisters Lode and Millsite, 7 L. D. 557; Le Neve Millsite, 9 L. D. 460; Brodie Gold Reduction Co., 29 L. D. 143; Cleary v. Skiffich, 28 Colo. 362, 89 Am. St. Rep. 207, 65 Pac. 59, 61, 21 Morr. Min. Rep. 284.

While the nature of the use required in case of the appropriation of a millsite as an adjunct to a located lode is not specified, and the law is satisfied so long as the purposes are reasonably associated with the lode to which it is appurtenant, in the case of sites selected under the last clause of section twenty-three hundred and thirty-seven, the character of the use is distinctly specified. The right to a patent for a millsite under this clause depends upon the presence *on the land sought to be patented* of a quartz-mill or reduction works.[43]

Land not improved or occupied for mining or milling purposes may not be appropriated as a millsite for the purpose of securing the use of water thereon.[44]

Water rights upon the public domain may not be acquired under the millsite laws.

Reservoirs, dams, and plants for generating power do not fall within the designation of quartz-mills and reduction works.[45]

§ 525. Location of junior lode claims conflicting with senior millsites.—We have heretofore observed that junior lode locators enjoy the privilege of placing the lines of their locations upon or across lands which have previously been appropriated by others whether mineral or nonmineral.[46]

The enunciation of this principle, however, has been accompanied by another,—that is, that the junior locator cannot by this method of placing his boundaries infringe upon or impair the rights acquired by the

[43] Brodie Gold Reduction Co., 29 L. D. 143.

[44] In re Cyprus Millsite, 6 L. D. 706; Mint Lode and Millsite, 12 L. D. 624.

[45] Le Neve Millsite, 9 L. D. 460; In re Lenning, 5 L. D. 190; Two Sisters Lode and Millsite, 7 L. D. 557.

[46] *Ante*, §§ 363, 363a.

prior appropriator. This last principle is of undoubted application to patented millsites, as the issuance of a patent conclusively presumes that the land covered by it is nonmineral.[47] But suppose it is discovered at any time after the location of the millsite and prior to the issuance of a patent therefor that the land embraced within it contains the apex of a discovered vein,—may a junior lode locator place his lines within the millsite boundary so as to deprive the millsite owner of that part of the tract embraced within the junior lode location? Under the placer laws a lode discovered within the limits of the prior placer claim might, by a peaceable entry in good faith on the surface of the placer, be located by a junior lode claimant, with surface ground of the width of fifty feet,[48] and to this extent the rights of the prior placer claimant must yield. But there is no such provision with reference to millsites or other class of nonmineral land. It is quite well settled, we think, that if at any time prior to the issuance of the patent for a millsite, the land is shown to be mineral in character, no patent therefor can issue, and the jurisdiction of the land department continues for the purpose of investigating the character of the land until a patent is issued.[49] Under this state of facts, the question arises, as between a prior millsite claimant and a conflicting junior lode locator who attempts to embrace within a lode location the apex of a previously discovered vein,—would the inquiry as to the character of the land be addressed to its known quality at the date of the millsite location, and thus preclude the junior lode locator from acquiring any rights against

[47] *Post*, § 779.
[48] *Ante*, § 415.
[49] Reed v. Bowron, 32 L. D. 383.

the millsite claimant, or would the discovery of the vein within the millsite at any time prior to its passing to patent render the vein subject to location by one entering peaceably and in good faith for that purpose?

The supreme court of Colorado is of the opinion that the inquiry as to the character of the land must be addressed to its known condition at the time the millsite locator's rights attached,—that is, the date upon which he took the first step in the series which culminated in the perfection of the location. Unless at that date the millsite area contained deposits which were then known to be valuable, and which could be worked at a profit, the junior lode claimant could not acquire any rights as against the millsite claimant.[50]

There is much to be said in favor of this rule, but it seems to us that it is not in harmony with the rule applied in cases of railroad grants,[51] homestead and pre-emption filings,[52] as well as townsite and placer claims. If lands within a millsite location could not be patented when they are discovered to be mineral, why should the millsite claimant be permitted to hold them under a law which interdicts the acquisition by millsite title of mineral lands? There is no presumption arising from a mere location that lands embraced within it are of a given character. If the return of the surveyor-general shows the land to be nonmineral, the presumption that it is of this character is only *prima facie*, and it is subject to contestation.[53]

Perhaps it would be the safer rule, and more in harmony with equitable considerations, to hold that when

[50] Cleary v. Skiffich, 28 Colo. 362, 89 Am. St. Rep. 207, 65 Pac. 59, 61, 21 Morr. Min. Rep. 284.

[51] *Ante*, §§ 154, 156.

[52] *Ante*, §§ 205, 206.

[53] *Ante*, § 106.

any claimant initiated an inchoate right to a tract of the public nonmineral land no discovery of mineral subsequent to the taking of the first step in the series of acts which might ultimately culminate in a final entry or patent should defeat the right of the nonmineral appropriator. But clearly this is not the rule followed by the executive department,[54] as we have heretofore noted.

[54] Reed v. Bowron, 32 L. D. 383.

CHAPTER VIII.

EASEMENTS.

§ 529. Scope of the chapter.
§ 530. Rights of way for ditches and canals—Highways.
§ 531. Location subject only to pre-existing easements.

§ 529. Scope of the chapter.—It is not our present purpose to deal with that class of easements and privileges which are created by deed or contract between individuals, nor with those which are necessarily appurtenant to all land acquired and held in private ownership. The scope of this chapter is limited to a consideration of those burdens which the government permits to be imposed upon its public lands, and subject to which it subsequently conveys its title.

§ 530. Rights of way for ditches and canals—Highways.—During the early period of mining in the west, a system was established by common consent, enabling the miner, in connection with his located mining claim, to exercise certain privileges with respect to the means of working it. Water was essential; therefore, the right to appropriate it, divert it from its natural channel, and conduct it over the public lands by means of flumes and ditches to the place of intended use, became fully recognized and established.

The government was not consulted in this matter, but it passively recognized these rights, as it did the larger privilege of extracting gold from the public mineral lands,[1] and by section nine of the act of July 26, 1866, gave legislative sanction to the exercise of these asserted rights. The section is as follows:—

[1] *Ante*, § 45.

That whenever, by priority of possession, rights to the use of water for mining, agricultural, or manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed; *provided, however*, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.[2]

This section was substantially re-enacted in the Revised Statutes. There are some verbal changes, but none affecting its substance or meaning.[3]

It has been contended that this act only undertook to confirm and protect rights vested prior to its passage, and that it did not necessarily sanction the future acquisition of such privileges. The opinion of the supreme court of the United States in Broder v. Natoma Water Company[4] would appear to support this contention, but as was said by the supreme court of California,[5] in construing this opinion, the question was not before the court. The ditch there involved was completed in 1853, and therefore was clearly within the confirmatory clauses of the act.

[2] For acts of congress providing for rights of way for canals, ditches, oil pipe-lines, and reservoirs, and regulations thereunder, see 36 L. D. 567.

[3] Jennison v. Kirk, 98 U. S. 453, 456, 25 L. ed. 240, 4 Morr. Min. Rep. 504.

[4] 101 U. S. 274, 276, 25 L. ed. 790, 5 Morr. Min. Rep. 33.

[5] Jacob v. Lorenz, 98 Cal. 332, 336, 33 Pac. 119, 121.

The supreme court of Nevada in construing the section in question, after referring to its "*turbid style*," and "grammatical solecisms," says:—

> In its adoption there appear to have been three distinct objects in view:—
>
> *First*—The confirmation of all existing water rights;
>
> *Second*—To grant the right of way over the public land to persons desiring to construct flumes or canals for mining or manufacturing purposes;
>
> *Third*—To authorize the recovery of damages by settlers on such land, against persons constructing such ditches or canals, for injuries occasioned thereby.[6]

The court adds:—

> That this section, granting rights of way over the public land to all who may desire to construct ditches or canals for mining or agricultural purposes, is about as clear and certain as the objects and purposes of the acts of congress usually are.

The supreme court of California coincides with the views of the supreme court of Nevada as to the scope and intent of the act under consideration.[7]

We have no intention of entering into a discussion of water rights generally, the manner of appropriating them, the purposes for which they may be acquired, or relative rights between such appropriators and riparian proprietors. As water may be the subject of appropriation under certain conditions for many useful purposes, other than as an adjunct to mining operations, and as there is nothing in the manner of

[6] Hobart v. Ford, 6 Nev. 77, 15 Morr. Min. Rep. 236. See, also, Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673.

[7] Jacob v. Lorenz, 98 Cal. 332, 336, 33 Pac. 119, 121; Lorenz v. Waldron, 96 Cal. 243, 31 Pac. 54, 56; Jacob v. Day, 111 Cal. 571, 44 Pac. 243, 245.

perfecting such appropriation peculiar to this particular class of ventures, we shall not undertake to deal with it to any serious extent in this treatise.[8] The law of waters is too broad in its scope to permit its treatment in a collateral way. All that we expect to demonstrate in reference to it is, that mining locations made upon the public lands must be made subject to any easements theretofore lawfully acquired and subsisting, and held for the purposes of conducting water over them. That this is the settled law there can be no doubt.[9]

This is but the reannouncement of the early doctrine, that the miner who selects a piece of ground to work must take it as he finds it, subject to prior rights which have an equal equity, on account of an equal recognition from the sovereign power.[10]

As to highways, section twenty-four hundred and seventy-seven of the Revised Statutes grants the right of way for the construction of highways over public lands not reserved for public uses. A mining location made subsequent to the laying out of a public road crossing it would be subject to the public easement.[11] This is a general principle applicable to all lands acquired from the government,[12] and is but the applica-

8 *Post*, § 838.

9 Jacob v. Day, 111 Cal. 571, 44 Pac. 243, 244; Rockwell v. Graham, 9 Colo. 36, 10 Pac. 284, 15 Morr. Min. Rep. 299; Welch v. Garrett, 5 Idaho, 639, 51 Pac. 405; Snyder v. Colorado Gold Dredging Co., 181 Fed. 63, 70, 104 C. C. A. 136.

10 Irwin v. Phillips, 5 Cal. 140, 147, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Logan v. Driscoll, 19 Cal. 623, 626, 81 Am. Dec. 90, 6 Morr. Min. Rep. 172; Stone v. Bumpus, 46 Cal. 218, 221, 4 Morr. Min. Rep. 278; Maffet v. Quine, 93 Fed. 347, 348.

11 Murray v. City of Butte, 7 Mont. 61, 14 Pac. 656, 657; Murray v. City of Butte, 31 Mont. 177, 77 Pac. 527, 528; City of Butte v. Mikosowitz, 39 Mont. 350, 102 Pac. 593, 595.

12 McRose v. Bottyer, 81 Cal. 122, 22 Pac. 393, 394; Bequette v. Patterson, 104 Cal. 284, 37 Pac. 917; Schwerdtle v. Placer County, 108

tion of the doctrine in ordinary conveyances where there are physical visible easements that both parties act upon the presumption that the conveyance is made charged with the easement.[13]

Mining claims frequently overlap or conflict with established rights of way, such as public roads and railroad rights of way. In such cases the areas in conflict are not necessarily excluded in patent applications. The patent might issue subject to the easement, the entryman, however, paying for the entire tract.[14]

The obligation on the mining claimant to support the surface would of course be mandatory.[15]

Subject to this duty the mining claimant might extract mineral from underneath the right of way.[16]

§ 531. Location subject only to pre-existing easements.—The right of the United States to grant easements and other limited rights on any portion of its public domain cannot be gainsaid, and subsequent purchasers must take it burdened with such easements or other rights.[17]

But when it has once disposed of its entire estate in the lands to one party, it can afterward no more

Cal. 591, 41 Pac. 448, 449; Smith v. Hawkins, 110 Cal. 125, 42 Pac. 453, 454.

[13] Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. 185, 190.

[14] Schirm-Carey and Other Placers, 37 L. D. 371; Moran v. Chicago B. & Q. R., 83 Neb. 680, 120 N. W. 192, 194. See, also, Rio Grande Western Ry. Co. v. Stringham, 38 Utah, 113, 110 Pac. 868, 870; Grand Canyon Ry. Co. v. Cameron, 35 L. D. 495.

[15] Southwest Missouri Ry. Co. v. Big Three M. Co., 138 Mo. App. 129, 119 S. W. 982, 983.

[16] See Grand Canyon Ry. Co. v. Cameron, 35 L. D. 495; Dilts v. Plumville R. Co., 222 Pa. 516, 71 Atl. 1072, 1076.

[17] Amador-Medean G. M. Co. v. S. Spring Hill M. Co., 13 Saw. 523, 36 Fed. 668, 670; Welch v. Garret, 5 Idaho, 639, 51 Pac. 405; Murray v. City of Butte, 31 Mont. 177, 77 Pac. 527.

burden it with other rights than any other proprietor of lands.[18]

The same doctrine applies to perfected mining locations. After such location has once been completed, the estate of its owner cannot be subjected to burdens, except for some public use;[19] or if sanctioned by the state constitution, perhaps, for a private use, upon condemnation proceedings.[20]

This phase of the subject has been discussed by us in a preceding portion of this work,[21] and it is unnecessary to here repeat what was there said.[21a]

As to other privileges which may be said to be incident to the ownership of mines and mining claims, we shall consider them when discussing the nature of the title acquired and rights conferred by location. This will include the cross-lode question and the privileges granted, if any, to a junior cross-lode locator.[22]

18 Woodruff v. North Bloomfield Gravel M. Co., 9 Saw. 441, 18 Fed. 753, 772. See, also, Dower v. Richards, 73 Cal. 477, 15 Pac. 105, 107; Amador Queen M. Co. v. Dewitt, 73 Cal. 482, 15 Pac. 74, 75.

19 St. Louis M. & M. Co. v. Montana M. Co., 113 Fed. 900, 902, 51 C. C. A. 530; affirmed on appeal, 194 U. S. 235, 24 Sup. Ct. Rep. 654, 48 L. ed. 953; Snyder v. Colorado Gold Dredging Co., 181 Fed. 63, 104 C. C. A. 136.

20 People v. District Court, 11 Colo. 147, 17 Pac. 298, 302; Robertson v. Smith, 1 Mont. 410, 7 Morr. Min. Rep. 196; Noteware v. Sterns, 1 Mont. 311, 4 Morr. Min. Rep. 650.

21 *Ante*, §§ 252–264.

21a It has been held by one of the district courts in Alaska that under local customs prevailing in that territory, one may enter upon an unpatented mining claim owned by another for the purpose of appropriating water flowing through it, and acquire a right of way, without condemnation, for the purpose of diverting it.

22 *Post*, §§ 557–561.

TITLE VI.

THE TITLE ACQUIRED AND RIGHTS CONFERRED BY LOCATION.

CHAPTER

I. THE CHARACTER OF THE TENURE.

II. THE NATURE AND EXTENT OF PROPERTY RIGHTS CONFERRED BY LODE LOCATIONS.

III. THE EXTRALATERAL RIGHT.

IV. THE NATURE AND EXTENT OF PROPERTY RIGHTS CONFERRED BY PLACER LOCATIONS.

V. PERPETUATION OF THE ESTATE BY ANNUAL DEVELOPMENT AND IMPROVEMENT.

VI. FORFEITURE OF THE ESTATE, AND ITS PREVENTION BY RESUMPTION OF WORK.

CHAPTER I.

THE CHARACTER OF THE TENURE.

§ 535. Nature of the estate as defined by the early decisions.
§ 536. Origin of the doctrine.
§ 537. Actual and constructive possession under miners' rules.
§ 538. Federal recognition of the doctrine.
§ 539. Nature of the estate as defined by the courts since the enactment of general mining laws.
§ 540. Nature of the estate compared with copyholds at common law.
§ 541. Nature of the estate compared with the *dominium utile* of the civil law.
§ 542. Nature of the estate compared with inchoate preemption and homestead claims.
§ 543. Dower within the states.
§ 544. Dower within the territories.

§ 535. Nature of the estate as defined by the early decisions.—It is somewhat difficult to comprehensively classify the nature of the estate acquired and held by the possessor of a valid mining location by the use of any definitive term recognized by the common law or employed in the United States to designate a particular tenure.[1]

In the early history of mining jurisprudence, the estate or interest acquired by the miner in his claim, held and worked under the local rules and customs, was treated as an interest in real property. It was liable to sale on execution,[2] and was subject to taxation.[3]

[1] Judge Knowles in Black v. Elkhorn M. Co., 49 Fed. 549, 550.

[2] McKeon v. Bisbee, 9 Cal. 137, 138, 70 Am. Dec. 642, 2 Morr. Min. Rep. 309.

[3] State of California v. Moore, 12 Cal. 56, 72, 14 Morr. Min. Rep. 110; People v. Shearer, 30 Cal. 645, 661; Hale & Norcross M. Co. v. Storey County, 1 Nev. 82, 14 Morr. Min. Rep. 155; People v. Taylor, 1 Nev. 88; Forbes v. Gracey, 94 U. S. 762, 767, 24 L. ed. 313, 14 Morr. Min. Rep. 183; Elder v. Wood, 208 U. S. 226, 232, 28 Sup. Ct. Rep. 263, 52 L. ed.

The supreme court of California thus announced its views:—

> From an early period of our state jurisprudence we have regarded these claims to public mineral lands as titles. They are so practically. . . . . Our courts have given them the recognition of legal estates of freehold; and so for all practical purposes, if we except some doctrine of abandonment not perhaps applicable to such estates, unquestionably they are, and we think it would not be in harmony with the general judicial system to deny to them the incidents of freehold estates in respect to this matter [4]

And in a later case the same tribunal stated the rule to be:—

> That although the ultimate fee in our public mineral lands is vested in the United States, yet, as between individuals, all transactions and all rights, interests, and estates in the mines are treated as being an estate in fee and as a distinct vested right of property in the claimant or claimants thereof, founded upon their possession or appropriation of the land containing the mine. They are treated, as between themselves and all persons but the United States, as the owners of the land and mines therein.[5]

As was said by the supreme court of Nevada, the courts and the laws, adapting themselves to the necessity of the case, and governed by rules of common

464; Bakersfield & Fresno Oil Co. v. Kern County, 144 Cal. 148, 77 Pac. 892, 893; Cobban v. Meagher, 42 Mont. 399, 113 Pac. 290, 293.

[4] Merritt v. Judd, 14 Cal. 60, 64, 6 Morr. Min. Rep. 62, cited and approved in Roseville Alta Co. v. Iowa Gulch, 15 Colo. 29, 22 Am. St. Rep. 373, 24 Pac. 920, 921, 16 Morr. Min. Rep. 93; Spencer v. Winselman, 42 Cal. 479, 482, 2 Morr. Min. Rep. 334; Buchner v. Malloy, 155 Cal. 253, 100 Pac. 687, 688.

[5] Hughes v. Devlin, 23 Cal. 502, 507, 12 Morr. Min. Rep. 241; Watts v. White, 13 Cal. 321, 324, 13 Morr. Min. Rep. 11.

sense, reason, and necessity, have universally treated the possessory rights of the miner as an estate in fee.[6] Actions for possession, similar to the action of ejectment,[7] actions to quiet title,[8] actions of trespass, bills for partition,[9] are constantly maintained. Such interests are held to descend to the heir,[10] to be subject to sale on execution,[11] and to be assets in the hands of executors and administrators for the payment of debts.[12]

§ 536. Origin of the doctrine.—The dignity thus attaching to the miner's title had its genesis in the early history of mining in the west, and was founded upon the law of possession. It was the natural result of the recognition by local legislatures of mining rights in the public domain, and the exercise of such rights by

[6] Mining claims are, regardless of statutory provisions, real estate. Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 1051, 22 Morr. Min. Rep. 610; S. C., in error, 198 U. S. 443, 25 Sup. Ct. Rep. 716, 49 L. ed. 1119; Bradford v. Morrison, 10 Ariz. 214, 86 Pac. 6, 7.

[7] Davidson v. Calkins, 92 Fed. 230, 232.

[8] Mt. Rosa M. M. & L. Co. v. Palmer, 26 Colo. 56, 77 Am. St. Rep. 245, 56 Pac. 176, 177, 50 L. R. A. 289; Fulkerson v. Chisna M. & I. Co., 122 Fed. 782, 785, 58 C. C. A. 582; Ripinsky v. Hinchman, 181 Fed. 786, 793, 105 C. C. A. 462.

[9] Dall v. Confidence S. M. Co., 3 Nev. 531, 93 Am. Dec. 419, 11 Morr. Min. Rep. 214; Aspen M. etc. Co. v. Rucker, 28 Fed. 220, 221 (disapproving Strettell v. Ballou, 3 McCrary, 46, 9 Fed. 256, 11 Morr. Min. Rep. 220).

But it is seldom that a division of mines may be made. Generally, partition suits must result in sale. *Post*, § 792; Aspen M. & S. Co. v. Rucker, 28 Fed. 220; Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263, 5 Morr. Min. Rep. 67. See, also, Coleman v. Coleman, 19 Pa. 100, 57 Am. Dec. 641, 11 Morr. Min. Rep. 183.

[10] Lohman v. Helmer, 104 Fed. 178, 182.

[11] Phoenix M. & M. Co. v. Scott, 20 Wash. 48, 54 Pac. 777, 778; Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1, 2.

[12] Hale & Norcross G. & S. M. Co. v. Storey County, 1 Nev. 83, 14 Morr. Min. Rep. 155.

appropriation under the local rules and customs. As no intruder upon the possession of a prior appropriator could successfully defend an action involving possessory rights by asserting that the paramount title was in the general government, this antecedent possession was in itself sufficient evidence of title. This was nothing more than the application of a familiar rule of the common law that, as against a mere trespasser, title may be inferred from possession. The actual possessor of real property was so far regarded by law as the owner thereof that no one could lawfully dispossess him of the same without showing some well-founded title of a higher or better character than such possession itself furnishes.[13]

The early announcement of the doctrine by the courts in the mining states that controversies between occupants of the public mineral lands were to be determined by the law of possession, and that persons claiming and in the possession of mining claims on these lands were, as between themselves and all other persons, except the United States, owners of the same, having a vested right of property founded on their possession and appropriation,[14] was the declaration of no new canon of jurisprudence.

The enunciation of the rule that the naked possessor of land was deemed in law the owner until the general government or a person showing title under it makes an entry upon the same, and that when this was done the right or claim of the possessor must yield to the paramount authority of the United States or its grantee,[15] was but a restatement of a well-established rule of law.

[13] 3 Washburn on Real Property, 3d ed., p. 114; 5th ed., p. 134.
[14] Hughes v. Devlin, 23 Cal. 501, 505, 12 Morr. Min. Rep. 241.
[15] Doran v. C. P. R. R., 24 Cal. 245, 255.

It is also a familiar doctrine of the common law that where one, under a title deed describing a parcel of land by metes and bounds, enters upon the premises, claiming to hold the same under his deed, he is constructively in possession of all that is included in his deed, though he actually occupies but a part;[16] and, by the same rule, any instrument having a grantor and a grantee, and containing an adequate description of the lands to be conveyed and apt words for their conveyance, gives color of title to the lands described.[17]

The application of these elementary rules to the novel and peculiar conditions surrounding the early history of the mining industry in the west, evolved a new *color of title* by which the extent of a miner's right of possession was determined.

§ 537. Actual and constructive possession, under miners' rules.—It was early announced as a rule of property that mining claims were held by compliance with local rules, and *pedis possessio* was not required to give a right of action. When the claim was defined, and a party entered into possession of a *part*, that possession was possession of the entire claim as against anyone but the true owner or prior occupant,[18] and priority of occupation established a priority of right.[19]

This doctrine of constructive possession was even extended to instances where the right asserted was not referable to local rules. Thus it was held that mining

[16] 3 Washburn on Real Property, 3d ed., p. 118; 5th ed., p. 138.

[17] Id., 3d ed., p. 139; 5th ed., p. 167; Brooks v. Bruyn, 35 Ill. 392.

[18] Attwood v. Fricot, 17 Cal. 37, 43, 76 Am. Dec. 567, 2 Morr. Min. Rep. 305; English v. Johnson, 17 Cal. 107, 116, 76 Am. Dec. 574, 12 Morr. Min. Rep. 202; Roberts v. Wilson, 1 Utah, 292, 4 Morr. Min. Rep. 498.

[19] Gibson v. Puchta, 33 Cal. 310, 316, 12 Morr. Min. Rep. 227.

ground acquired by an entry under a claim for mining purposes upon a tract the bounds of which were distinctly marked by physical marks, accompanied with actual occupancy of a part of the tract, was sufficient to enable the possessor to maintain ejectment for the entire claim, although such acts of appropriation were not done in accordance with any local mining rule.[20]

In such case, however, the extent of such location was not without limit. The quantity taken must have been reasonable, and whether it was so or not was to be determined in such cases by the general usages and customs prevailing upon the general subject. If an unreasonable quantity was included within the boundaries, the location was ineffectual for any purpose, and possession under it only extended to the ground actually occupied.[21]

But, as a rule, mere entry and possession gave no right to the exclusive enjoyment of any given quantity of the public mineral lands.[22]

Where an occupant relied upon constructive possession, it devolved upon him to establish three essential facts:—

(1) That there were local mining customs, rules, and regulations in force in the district embracing the claims;

(2) That particular acts were required to be performed in the location and working of the claims;

[20] Table Mountain T. Co. v. Stranahan, 20 Cal. 198, 209, 9 Morr. Min. Rep. 457; Hess v. Winder, 30 Cal. 349, 355, 12 Morr. Min. Rep. 217. See Valcalda v. Silver Peak Mines, 86 Fed. 90, 94.

[21] Table Mountain T. Co. v. Stranahan, 20 Cal. 198, 209, 9 Morr. Min. Rep. 457. See Mallett v. Uncle Sam M. Co., 1 Nev. 156, 188, 90 Am. Dec. 484, 1 Morr. Min. Rep. 17.

[22] Smith v. Doe, 15 Cal. 100, 105, 5 Morr. Min. Rep. 218; Gillan v. Hutchinson, 16 Cal. 153, 156, 2 Morr. Min. Rep. 317.

(3) That he had substantially complied with the requirements.[23]

This rule was somewhat relaxed in favor of a purchaser who entered under a deed which contained definite and certain boundaries which could be marked out and made known from the deed alone,[24] which was nothing more than a reiteration of the doctrine of the common law relative to entries under color of title, heretofore mentioned. The miner's title extended to such mining lands as were reduced to his actual possession, or to such as were constructively in his possession, according to the rules above enumerated.

§ 538. Federal recognition of the doctrine.—While the government passively encouraged and fostered the system of development of the mineral resources as practiced in the mining states and territories, it gave no legislative expression of its encouragement, or any recognition that the occupants of the public mineral lands were other than mere trespassers, until February 27, 1865, when congress passed an act providing for a district and circuit court for the state of Nevada, the ninth section of which provided as follows:—

> That no possessory action between individuals in any of the courts of the United States for the recovery of any mining title, or for damages to such title, shall be affected by the fact that the paramount title to the land on which such mines are is in the United States; but each case shall be adjudged by the law of possession.[25]

[23] Pralus v. Jefferson G. & S. M. Co., 34 Cal. 558, 562, 12 Morr. Min. Rep. 473.

[24] Hess v. Winder, 30 Cal. 349, 356, 12 Morr. Min. Rep. 217.

[25] 13 Stats. at Large, 441; Comp. Stats. 1901, p. 679; 5 Fed. Stats. Ann. 35.

This was re-enacted in the Revised Statutes,[26] and forms a part of the general legislation of congress on the subject of mineral lands.

The supreme court of the United States, in the case of Forbes v. Gracey,[27] approved and confirmed the doctrine of the early decisions as to the nature of a locator's estate.

> Those claims [said that court] are the subject of bargain and sale, and constitute very largely the wealth of the Pacific Coast states. They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the states and the federal government. These claims may be sold, transferred, mortgaged, and inherited, without infringing the title of the United States.[28]

§ 539. Nature of the estate as defined by the courts since the enactment of general mining laws.—With reference to the character of the estate held by a mining locator since the passage of the act of July 26, 1866, the decisions of the courts, both state and federal, are quite harmonious. They in no way antagonize the theories of the earlier decisions, but adopt them. Naturally, the definition is enlarged and perfected. A mere occupant of lands, who is technically a trespasser, has rights of less dignity than one who enters with the consent of the paramount proprietor under rules defining the terms of his occupancy and the extent and limit of his rights.

[26] § 910.

[27] 94 U. S. 762, 767, 24 L. ed. 313, 14 Morr. Min. Rep. 183.

[28] See, also, Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 62, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; O'Connell v. Pinnacle Gold M. Co., 140 Fed. 854, 855, 4 L. R. A., N. S., 919, 72 C. C. A. 645; Reed v. Munn, 148 Fed. 737, 757, 80 C. C. A. 215.

Prior to the issuance of a patent the locator cannot be said to own the fee simple title. The fee resides in the general government, whose tribunals, specially charged with the ultimate conveyance of the title, must pass upon the qualifications of the locator and his compliance with the law. Yet, as between the locator and everyone else save the paramount proprietor the estate acquired by a perfected mining location possesses all the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied, the character of the tenure remains that of a fee. As between the locator and the government, the former is the owner of the beneficial estate, and the latter holds the fee in trust, to be conveyed to such beneficial owner upon his application in that behalf and in compliance with the terms prescribed by the paramount proprietor.[29]

Until patent issues the locator's muniments of title consist of the laws under the sanction of which his rights accrue, the series of acts culminating in a completed valid location, and those necessary to be continuously performed to perpetuate it.

A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent. It is subject to administration and sale in payment of the debts of the deceased owner.[30] "It is vendible, inheritable and taxable,"[31] "a legal estate of freehold,"[32]

[29] Noyes v. Mantle, 127 U. S. 348, 351, 8 Sup. Ct. Rep. 1132, 32 L. ed. 168; Dahl v. Raunheim, 132 U. S. 260, 262, 10 Sup. Ct. Rep. 74, 33 L. ed. 325, 16 Morr. Min. Rep. 214; Gillis v. Downey, 85 Fed. 483, 487, 29 C. C. A. 286.

[30] O'Connell v. Pinnacle Gold Mines Co., 131 Fed. 106, 109; S. C., on appeal, 140 Fed. 854, 4 L. R. A., N. S., 919, 72 C. C. A. 645.

[31] Elder v. Wood, 208 U. S. 226, 232, 28 Sup. Ct. Rep. 263, 52 L. ed. 464.

[32] Buchner v. Malloy, 155 Cal. 253, 100 Pac. 687, 688.

and "subject to the lien of a docketed judgment."[33] It has the effect of a grant by the United States of the right of present and exclusive possession of the lands located,[34] at least for mining purposes.[35] Actual possession is not more necessary for the protection of the title acquired to such a claim by a valid location than it is for any other grant.[36] It is in its nature real estate.[37]

Although the locator may obtain a patent, this patent adds but little to his security.[38]

[33] Bradford v. Morrison, 212 U. S. 389, 395, 29 Sup. Ct. Rep. 349, 53 L. ed. 564.

[34] Clipper M. Co. v. Eli M. Co., 194 U. S. 220, 226, 24 Sup. Ct. Rep. 632, 48 L. ed. 944; East Central Eureka M. Co. v. Central Eureka M. Co., 204 U. S. 266, 271, 27 Sup. Ct. Rep. 258, 51 L. ed. 476; Bradford v. Morrison, 212 U. S. 389, 394, 29 Sup. Ct. Rep. 349, 53 L. ed. 564; Bergquist v. West Virginia & Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673, 682; Forbes v. Gracey, 94 U. S. 762, 766, 24 L. ed. 313, 14 Morr. Min. Rep. 183; Gillis v. Downey, 85 Fed. 483, 487, 29 C. C. A. 286; Stratton v. Gold Sovereign M. & T. Co., 1 Leg. Adv. 350; Phoenix M. & M. Co. v. Scott, 20 Wash. 48, 54 Pac. 777, 778; McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 592, 50 L. R. A. 184. See *ante*, § 322, note 7, where all the cases are cited.

[35] United States v. Rizzinelli, 182 Fed. 675, 684.

[36] Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708, 709; McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 593, 50 L. R. A. 184; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869; Belk v. Meagher, 104 U. S. 279, 284, 26 L. ed. 735, 1 Morr. Min. Rep. 510; Gwillim v. Donnellan, 115 U. S. 45, 49, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15 Morr. Min. Rep. 482; Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600, 602; McCulloch v. Murphy, 125 Fed. 147, 150; Holdt v. Hazard, 10 Cal. App. 440, 102 Pac. 540, 541; McLemore v. Express Oil Co., 158 Cal. 559, 139 Am. St. Rep. 147, 112 Pac. 59, 1 Water and Min. Cas. 232.

[37] Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 22 Morr. Min. Rep. 610; S. C., in error, 198 U. S. 443, 449, 25 Sup. Ct. Rep. 716, 49 L. ed. 1119; Bradford v. Morrison, 10 Ariz. 214, 86 Pac. 6.

[38] Chambers v. Harrington, 111 U. S. 350, 353, 4 Sup. Ct. Rep. 428, 28 L. ed. 452.

The owner of such a location is entitled to the exclusive possession and enjoyment, against everyone, including the United States itself.[39]

> Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator. . . . . He may sell it, mortgage it, or part with the whole or any portion of it as he may see fit.[40]

He is entitled to the most plenary and summary remedies for quieting his claim cognizable in equity.[41]

As was said by the supreme court of Oregon,[42] the general government itself cannot abridge the rights of the miner. There are equitable circumstances binding upon the conscience of the governmental proprietor that must never be disregarded. Rights have become vested that cannot be divested without the violation of all the principles of justice and reason.[43] The same fundamental rules of right and justice govern nations, municipalities, corporations, and individuals.[44] The government may not destroy the locator's rights by withdrawing the land from entry or placing it in a state of reservation.[45]

[39] McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076, 1077; Gold Hill Q. M. Co. v. Ish, 5 Or. 104, 11 Morr. Min. Rep. 635; Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240, 244; Reed v. Munn, 148 Fed. 737, 757, 80 C. C. A. 215.

[40] St. Louis M. & M. Co. v. Montana Limited, 171 U. S. 650, 655, 19 Sup. Ct. Rep. 61, 43 L. ed. 320.

[41] Gillis v. Downey, 85 Fed. 483, 488, 29 C. C. A. 286.

[42] Gold Hill Q. M. Co. v. Ish, 5 Or. 104, 11 Morr. Min. Rep. 635.

[43] To the same effect, see Merced M. Co. v. Fremont, 7 Cal. 317, 327, 68 Am. Dec. 262, 7 Morr. Min. Rep. 313; Conger v. Weaver, 6 Cal. 548, 557, 65 Am. Dec. 528.

[44] United States v. Northern Pac. R. R., 95 Fed. 864, 880, 37 C. C. A. 290.

[45] Military and National Park Reservations. Opinion Assistant Attorney-General, 25 L. D. 48; Instructions, 32 L. D. 387.

The doctrine hereinbefore enunciated has never been seriously questioned. It has been reiterated in many cases in both the state and federal courts.[46]

The supreme court of Oregon has said that the nature of title or rights acquired or held by a locator in possession of a mining claim prior to his compliance with the provisions of the statutes of the United States entitling him to a patent is difficult to determine from authorities; that prior to such compliance it is agreed he has an absolute right of possession; that in many states this possessory right is by statute declared to be an interest in real estate and subject to seizure and sale as such, and the decisions of the courts holding it to be real estate are most, if not all, based upon some statutory provision.[47]

This may be quite true; but it is to be remembered that the statutory enunciation of the principle was in the beginning but an expression in a higher form of a rule which had its origin in local customs,—the

[46] Manuel v. Wulff, 152 U. S. 505, 510, 14 Sup. Ct. Rep. 651, 38 L. ed. 532; Black v. Elkhorn M. Co., 163 U. S. 445, 447, 16 Sup. Ct. Rep. 1101, 41 L. ed. 221; S. C., before Judge Knowles, 49 Fed. 549, 553; McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076, 1078; Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240; Wills v. Blain, 4 N. M. 378, 20 Pac. 798, 802; Harris v. Equator M. & S. Co., 3 McCrary, 14, 8 Fed. 863, 866, 12 Morr. Min. Rep. 178; Keeler v. Trueman, 15 Colo. 143, 25 Pac. 311; Houtz v. Gisborn, 1 Utah, 173, 2 Morr. Min. Rep. 340; Talbott v. King, 6 Mont. 76, 9 Pac. 434, 435; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, 5 Pac. 570, 575; McKinley Creek M. Co. v. Alaska United M. Co., 183 U. S. 563, 571, 22 Sup. Ct. Rep. 84, 46 L. ed. 331; McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 592, 50 L. R. A. 184; Phoenix M. & M. Co. v. Scott, 20 Wash. 48, 54 Pac. 777, 778; Mt. Rosa M. M. & L. Co. v. Palmer, 26 Colo. 56, 77 Am. St. Rep. 245, 56 Pac. 176, 177, 50 L. R. A. 289; Davidson v. Calkins, 92 Fed. 230, 232; Bakersfield & Fresno Oil Co. v. Kern County, 144 Cal. 148, 77 Pac. 892, 893; Reed v. Munn, 148 Fed. 737, 757, 80 C. C. A. 215; Bradford v. Morrison, 212 U. S. 389, 29 Sup. Ct. Rep. 349, 53 L. ed. 564.

[47] Herron v. Eagle M. Co., 37 Or. 155, 61 Pac. 417.

"American common law of mines,"—and the acceptance of the doctrine by the federal tribunals arose out of a consideration of these equitable circumstances.[48] It cannot be doubted that each state may determine for itself the nature or character of actions which may be maintained in its courts for the redress of private wrongs, and may in this behalf, and perhaps others, classify interests in real property as chattels or chattels real, or declare that a given privilege exercised with reference to land shall not be classified as an interest in real estate, for the purpose of either litigation or taxation. But this does not, as we understand it, militate against the dignity of the estate in an unpatented mining claim accorded by the decisions of all the courts, state and federal, from the beginning.

The principles here discussed will again be the subject of consideration when we deal with the nature of the remedies which are available to the owner of a mining claim and the forum in which actions are to be brought to redress injuries thereto.

§ 540. Nature of the estate compared with copyholds at common law.—It has been said that the interest of a locator of a mining claim is, in some respects, not unlike that of a copyholder at common law; that both had their origin in local customs, and in each the custom crystallized into law; that the copyholder held his land by the custom of the manor, and while the fee remained in the lord the right to the possession and enjoyment of the premises was in him. He might alienate his lands at will, and on his death they descended to his heirs; the copyholder was a feeholder, yet the fee was in the lord.[49]

[48] See East Central Eureka M. Co. v. Central Eureka M. Co., 204 U. S. 266, 271, 27 Sup. Ct. Rep. 258, 51 L. ed. 476.

[49] Black v. Elkhorn, 52 Fed. 859, 862, 3 C. C. A. 312.

The same authority states that the estate of the copyholder might be taken in execution for the payment of his debts. We are not sure that this is a correct statement of the rule of the common law. Blackstone says, speaking of this class of estates, that no creditor could take possession of lands, but could only levy upon the growing profits, so that if the defendant aliened his lands the plaintiff was ousted of his remedy. Therefore, copyhold lands were not liable to be taken in execution upon a judgment.[50] The American authorities seem to support this view.[51]

Be that as it may, there is one essential difference between the two estates with reference, at least, to the extent of the thing possessed and enjoyed.

In copyhold or customary lands, the lord of the manor is owner of the minerals, but the tenant is in possession of them, and consequently, in the absence of prescription or a special custom to the contrary, the one cannot explore mines without the consent of the other, although the tenant may continue the working of mines and quarries already opened.[52]

§ 541. Nature of the estate compared with the dominium utile of the civil law.—The nature of the estate held by a locator in a mining claim bears some resemblance to the *emphyteusis* or *dominium utile* of the Roman or civil law. Although the *emphyteuta* did not become owner of the thing, yet he had nearly all the rights of an owner. It was *jus in re aliena*, which in its extent and effects nearly resembled owner-

50 3 Blackstone, 418, 419.

51 Watson on Sheriffs, 208; Wildey v. Bonny, 26 Miss. 35; Colvin v. Johnson, 2 Barb. (N. Y.) 206; Bigelow v. Finch, 11 Barb. 498, 17 Barb. 394.

52 Rogers on Mines, 270; MacSwinney on Mines, 72; Arundell on Mines, 4; Bainbridge on Mines, 4th ed., p. 37.

ship. He had the full right of enjoyment, consequently the right of possessing the thing and of reaping all the fruits thereof. He might dispose of the substance of the thing, transfer the exercise of his right to another, and alienate it, *inter vivos* or *causa mortis*. He might mortgage it and burden it with servitudes, without requiring the consent of the *dominus* thereto.

His right to absolutely dispose of his estate was subject only to a preferred right of purchase in the *dominus* at the price offered. At the death of the *emphyteuta*, the *emphyteusis* descended to his heirs. The *emphyteutical* right was usually acquired by grant, although it might be acquired by prescription.[53]

> *Dominium utile* is a right which the vassal hath in the land, or some immovable thing of his lord, to use the same and take the profit thereof, hereditarily or *in perpetuum*.[54]

§ 542. Nature of the estate compared with inchoate pre-emption and homestead claims.—Judge Ross, in the case of Black v. Elkhorn,[55] makes a comparison between the estate held by a mining locator and a pre-emption claimant prior to final entry and payment. While for the purposes of the case then under consideration, where dower was asserted in an unpatented mining claim, the comparison was not wholly inapt, yet we think the inference which may be drawn, that the estate of a mining locator is of no greater dignity than that of an inchoate pre-emption right, should not pass unchallenged. What are the essential differences between the two estates?

53 Kaufman's Mackeldey, vol. i, §§ 324, 325.

54 1 Spence's Equity Jurisprudence, 31, 33; Bowers v. Keesecker, 14 Iowa, 301.

55 52 Fed. 859, 861, 3 C. C. A. 312.

(1) By their pre-emption laws, the United States did not enter into any contract with the settler, nor incur any obligation that the land occupied by him shall ever be offered for sale. They simply declared that *in case any of their lands are thrown open for sale* the privilege to purchase should be first given to parties who had settled upon and improved them.[56]

No estate in the land was acquired or right thereto vested in the claimant of an inchoate pre-emption right, unless and until the amount of purchase money was paid.[57] The same doctrine applies to homestead claims.[58]

With reference to its mineral lands, the government has declared that they are free and open to exploration and *purchase*,[59] and a positive compact is made between the government and the discoverer and locator, whereby the latter, upon compliance with the law, is clothed with the *exclusive* right of possession and enjoyment.[60]

The locator of a mining claim is given a higher estate than is given the settler or locator under any other land laws.[61]

[56] Hutchings v. Low, 15 Wall. 77, 21 L. ed. 82; Campbell v. Wade, 132 U. S. 34, 38, 10 Sup. Ct. Rep. 9, 33 L. ed. 240; Black v. Elkhorn M. Co., 49 Fed. 549, 553; Graham v. Great Falls Water Power & T. Co., 30 Mont. 393, 76 Pac. 808.

[57] Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664, 665, and cases cited.

[58] Wagstaff v. Collins, 97 Fed. 3, 8, and cases cited.

[59] Rev. Stats., § 2319; 17 Stats. at Large, 91; Comp. Stats. 1901, p. 1424; 5 Fed. Stats. Ann. 4.

[60] Rev. Stats., § 2322; Erhardt v. Boaro, 113 U. S. 527, 535, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113; Black v. Elkhorn M. Co., 49 Fed. 549, 550.

[61] O'Connell v. Pinnacle Gold Mining Co., 140 Fed. 854, 855, 4 L. R. A., N. S., 219, 72 C. C. A. 645. As to the general rule regarding "vested rights" in public lands and when they attach so as to be immune from congressional interference, see Graham v. Great Falls Water Power & T. Co., 30 Mont. 393, 76 Pac. 808, and cases cited; Instruc-

If the government, after a valid mining location has been made, could deprive the locator of his rights, his right of possession certainly would not be *exclusive.*

(2) The pre-emptor is required to apply for patent within a fixed period of time. There is nothing in the mining law requiring a locator to proceed to patent at all.[62] He may never do so, yet his estate is fully maintained in its integrity so long as the law which is a muniment of his title is complied with. An application for a patent is not essential to the acquisition or maintenance of a mining claim.[63] The patent adds but little to the security of the locator.[64] Certainly the failure to apply for one or the fact that one has not been issued in no way militates against the validity of the location.[65]

That the general government itself cannot deprive the locator of rights accrued under the mining laws has, we think, been fully demonstrated.

(3) Prior to entry and payment, the pre-emptor cannot convey or assign his interest to others.[66]

Such a conveyance or assignment would extinguish the pre-emption right.[67]

tions, 32 L. D. 383. See, also, East Central Eureka M. Co. v. Central Eureka M. Co., 204 U. S. 266, 271, 27 Sup. Ct. Rep. 258, 51 L. ed. 476.

[62] O'Connell v. Pinnacle Gold Mines Co., 131 Fed. 106, 109.

[63] Coleman v. McKenzie, 29 L. D. 359; Nome & Sinook Co. v. Townsite of Nome, 34 L. D. 276.

[64] Chambers v. Harrington, 111 U. S. 350, 353, 4 Sup. Ct. Rep. 428, 28 L. ed. 452; Gold Hill Q. M. Co. v. Ish, 5 Or. 104, 11 Morr. Min. Rep. 635; Chapman v. Toy Long, 4 Saw. 28, Fed. Cas. No. 2610, 1 Morr. Min. Rep. 497; Shafer v. Constans, 3 Mont. 369, 1 Morr. Min. Rep. 147.

[65] Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 224, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

[66] Dillingham v. Fisher, 5 Wis. 475; McLane v. Bovee, 35 Wis. 27; Trulock v. Taylor, 26 Ark. 54; Busch v. Donohue, 31 Mich. 482; Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; Aiken v. Ferry, 6 Saw. 79, Fed. Cas. No. 112; Lamb v. Davenport, 18 Wall. 307, 314, 21 L. ed. 759; Schoolfield v. Houle, 13 Colo. 394, 22 Pac. 781, 782.

[67] Quinn v. Kenyon, 38 Cal. 499.

The right to transfer a mining claim has never been questioned.[68]

(4) It is not until entry and payment under a pre-emption claim that the land becomes subject to taxation by the state.[69]

As we have heretofore shown,[70] mining claims are so subject.

(5) Inchoate pre-emption claims are not subject to execution so as to enable the purchaser at the sale to obtain title from the government.[71]

The contrary has always been the rule as to mining claims.[72]

(6) An inchoate pre-emption could not be disposed of by will.[73] Heirs alone would have the right to complete the entry. In such cases the heirs do not take title by descent from their ancestor, but the land is conveyed to them directly from the United States by virtue of the privilege of purchase given to them expressly by the provisions of section twenty-two hundred and sixty-nine of the Revised Statutes.[74]

In the case of the death of a homestead claimant who has earned title to the land the right to submit final

68 St. Louis M. & M. Co. v. Montana M. Co., 171 U. S. 650, 655, 19 Sup. Ct. Rep. 61, 43 L. ed. 320.

69 Carroll v. Safford, 3 How. 440, 441, 11 L. ed. 671; Witherspoon v. Duncan, 4 Wall. 210, 219, 18 L. ed. 339.

70 *Ante*, § 539.

71 Moore v. Besse, 43 Cal. 511, 514; Bray v. Ragsdale, 53 Mo. 170; Cravens v. Moore, 61 Mo. 178; 1 Freeman on Executions, § 176; Daugherty v. Marcuse, 3 Head, 323; Crutsinger v. Catron, 10 Humph. 24; Rhea v. Hughes, 1 Ala. 219, 34 Am. Dec. 772; Hatfield v. Wallace, 7 Mo. 112; Brown v. Massey, 3 Humph. 470.

72 Reed v. Munn, 148 Fed. 737, 757, 80 C. C. A. 215.

73 Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664, 665, citing Rogers v. Clemans, 26 Kan. 522.

74 Id.

proof and obtain patent is in the widow under the terms of the statute.[75]

Heirs would only be entitled (under the statute) in the event there was no widow.[76]

In the absence of any statute upon the subject, the privilege given by the government would lapse with the death of the pre-emptor.[77]

Devisees, as such, would not be recognized by the government.[78]

Even an administrator could not perfect the right, unless it was established that there was in existence some person for whose benefit the right might be perfected.[79]

Unpatented mining claims descend to the heir,[80] or may be devised the same as patented claims or other classes of real property.

We have heretofore shown[81] the analogy between the mine locator's estate and the *dominium utile* of the civil law. No such analogy exists with reference to pre-emption claims.[82]

What has heretofore been said in reference to inchoate pre-emption claims applies with equal force to federal homestead claims prior to final entry. It seems to us that the distinction between the character of the

75 Rev. Stats., § 2291; Boyle v. Wolfe, 27 L. D. 572; McCune v. Essig, 199 U. S. 382, 388, 26 Sup. Ct. Rep. 78, 50 L. ed. 273.

76 Currans v. Williams' Heirs, 20 L. D. 109; Rooney v. Bourke's Heirs, 27 L. D. 596; McCune v. Essig, 199 U. S. 382, 389, 26 Sup. Ct. Rep. 78, 50 L. ed. 273. See Heirs of May Lyon, 40 L. D. 489.

77 Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664, 665.

78 Rev. Stats., § 2269; 5 Stats. at Large, 620; Comp. Stats. 1901, p. 1380; 6 Fed. Stats. Ann. 282.

79 Elliott v. Figg, 59 Cal. 117, 118.

80 O'Connell v. Pinnacle Gold Mines Co., 131 Fed. 106, 109.

81 *Ante*, § 541.

82 Bowers v. Keesecker, 14 Iowa, 301.

estate held by a pre-emptioner or homestead claimant, prior to final entry, and the owner of a perfected mining location is decidedly marked.

It has been said that the mining laws provide for three classes of titles:—

(1) Possessory: a location prior to entry and payment;

(2) Complete equitable: a location after entry and payment and before patent;

(3) Fee simple: after patent.[83]

While this may be true in one sense, yet a patent cannot confer any greater rights than those flowing from a valid perfected mining location. Pre-emption and homestead claims pass through the same gradations of title, but the nature and extent of the possessory right conferred are essentially different.

§ 543. Dower within the states.—Each state regulates for itself the laws of descent, the domestic relation, and property rights between husband and wife. The subject of dower is one upon which congress may legislate so far as the territories are concerned, but within the states it is powerless to grant the right, or deny its existence where the state creates it. Therefore, in determining what rights, if any, the wife has in the lands or possessions of the husband, in any given state, we must, as a rule, look to state legislation and the decisions of state courts. Of the precious metal bearing states, no dower right whatever exists in Arizona, California, Colorado, Idaho, Nevada, New Mexico, North Dakota, South Dakota, Washington, or

[83] America Hill Quartz Mine, 3 Sickle's Min. Dec. 377, 385; Benson M. etc. Co. v. Alta M. etc. Co., 145 U. S. 428, 430, 12 Sup. Ct. Rep. 877, 36 L. ed. 762.

Wyoming. In Montana a widow is entitled to the third part of all lands whereof her husband was seised of an estate of inheritance, and equitable estates are subject to such dower right.[84]

There can be no doubt that as to a patented mining claim, or one that has passed to entry and for which a certificate of purchase has been issued, the dower right would attach, the same as it would to any other class of lands; but as to whether such right could be asserted in a perfected mining location prior to entry and payment has been the cause of serious controversy.

In the case of Black v. Elkhorn Mining Co.,[85] Judge Knowles held that such an estate was subject to the wife's dower, but where the husband had conveyed the property to a purchaser who subsequently applied for and received a patent, the wife having failed to assert her rights by adverse claim, the dower right was lost.

The case was taken to the United States circuit court of appeals,[86] which court held that a mere locator of a mining claim, owning only a possessory right conferred by the statute, has no such estate in the property as against the United States or its grantee as will permit rights of dower to be predicated thereon by virtue of any state legislation. In other words, Judge Knowles gave the right judgment but the wrong reason for it. The supreme court of the United States affirmed the ruling of the circuit court of appeals[87] on parallel lines

[84] Civ. Code, § 228; Rev. Code 1907, § 3708; Chadwick v. Tatem, 9 Mont. 354, 23 Pac. 729, 731; Black v. Elkhorn M. Co., 47 Fed. 600, 602.

[85] 47 Fed. 600, 602.

[86] 52 Fed. 859, 860, 3 C. C. A. 312.

[87] Black v. Elkhorn M. Co., 163 U. S. 445, 447, 16 Sup. Ct. Rep. 1101, 41 L. ed. 221.

of reasoning, without, however, intending to impair the dignity of the miner's estate in a location.[88]

To what extent the doctrine of the supreme court of the United States might be deemed binding on the conscience of the state courts is a question not necessary for us to determine.[89] The result reached is manifestly in consonance with the preconceived notions of practitioners in the mining regions. A contrary rule would have disturbed many mining titles and opened the door to vexatious litigation. If in the process of reasoning by which the ultimate conclusion has been reached the dignity of the mining locator's estate has suffered to a slight extent, it has suffered in a good cause. We are fully justified, from the foregoing authorities, in accepting as a settled doctrine, that in states where the dower right exists by virtue of state legislation, such right will not attach to a mining claim held simply by location.

The states of Oregon and Utah have dower laws similar to those of Montana. Nebraska and Florida, both of which states are nominally subject to the general mining laws of congress, but which are not classified as metal-bearing states, likewise make provision for dower rights in the wife.[90]

§ 544. Dower within the territories.—Alaska is the only remaining territory subject to congressional legislative control. The law as to dower in Alaska is as follows:—

[88] Bradford v. Morrison, 212 U. S. 389, 396, 29 Sup. Ct. Rep. 349, 53 L. ed. 564.

[89] Held to be binding as applying the principle to community property. Phoenix M. & M. Co. v. Scott, 20 Wash. 48, 54 Pac. 777, 778.

[90] For interesting note on the subject of "Dower in Mines," see 3 C. C. A. 316.

> The widow of every deceased person shall be entitled to dower or the use during her natural life of one-third part in value of all the lands whereof her husband died seised of an estate of inheritance.[91]

The construction applied to this statute is in effect the same as applied by the courts in Montana. The wife has no dower interest in a mining claim sold by her husband during his lifetime, and a husband's interest in a mining claim is not subject to any possible encumbrances of the wife by way of dower in the premises.[92]

It may be conceded that with the exception of those states heretofore enumerated, and the territory of Alaska, the dower right does not exist.

Whether or not it is necessary in any of the states or in Alaska for a wife to join with the husband in a conveyance of real property, by which term we include mining locations, depends, of course, upon the laws of the several state and territorial jurisdictions.[93] It is beyond the scope of this treatise to enter into a detailed statement of the rules of law regulating conveyancing in these different states. They are general laws, affecting all classes of real property without distinction.

91 Carter's Annotated Codes, § 36, p. 363.

92 Bechtol v. Bechtol, 2 Alaska, 397, 401.

93 It has been held in Idaho that a mining claim located in that state by a husband is community property. Jacobson v. Bunker Hill & Sullivan M. & C. Co., 2 Idaho, 863, 3 Idaho, 126, 28 Pac. 396. A contrary doctrine seems to have been reached by the supreme court of Washington. Phoenix M. & M. Co. v. Scott, 20 Wash. 48, 54 Pac. 777, 778. As to New Mexico, see McAlister v. Hutchinson, 12 N. M. 111, 75 Pac. 41, 42.

CHAPTER II.

THE NATURE AND EXTENT OF PROPERTY RIGHTS CONFERRED BY LODE LOCATIONS.

ARTICLE I. INTRODUCTORY—INTRALIMITAL RIGHTS.
II. CROSS-LODES.

ARTICLE I. INTRODUCTORY—INTRALIMITAL RIGHTS.

§ 548. General observations.
§ 549. Classification of rights with reference to boundaries.
§ 550. Extent of the grant as defined by the statute.
§ 551. The right to the surface and presumptions flowing therefrom.
§ 552. Intralimital rights not affected by the form of surface location.
§ 553. Pursuit of the vein on its course beyond bounding planes of the location not permitted.

§ 548. General observations.—It has been satisfactorily established that the estate created by a valid perfected mining location, as between the locator and everyone else save the government, is in the nature of a fee simple. Under ordinary circumstances this would be a sufficient characterization of the estate. The attributes of a fee simple estate are well understood, and no explanation is required. But the peculiarities of the mining law render it necessary to elaborate and define with greater particularity than is possible by the use of a single descriptive term the nature and extent of property rights conferred by perfected mining locations.

There are certain rights which may be said to be common to all classes of locations. There are others which are peculiar to one or the other. In order to treat the subject analytically, we are compelled to deal with the two classes separately, first considering the subject of lodes, or veins.

§ 549. Classification of rights with reference to boundaries.—Property rights conferred by lode locations may be subdivided for the purpose of convenience into two classes:—

(1) Those which are confined to things embraced within the boundaries of the location. By the term "boundaries," as we here employ it, we include not only the surface lines, but the vertical planes drawn downward through them. If we may be excused for introducing into the mining vocabulary coined and eccentric words, we would classify these rights as *intralimital;*

(2) Those which, while depending for their existence upon the ownership of things within the boundaries, may be exercised under certain conditions and restrictions out of, and beyond, those boundaries. These rights may be classified as *extralimital.*[1]

Whether these terms will ever come into general use or not, they will at least enable the author to formulate his views, express them according to his conception of the law, and group the different elements under distinctive and homogeneous titles. For the purpose of classification, therefore, we may say that property rights flowing from a valid lode location are either intralimital or extralimital. We will examine the nature and extent of these rights in the order named.

§ 550. Extent of the grant as defined by the statute. Section twenty-three hundred and twenty-two of the Revised Statutes provides that,—

[1] The supreme court of Colorado approves these classifications but prefers *intraliminal* and *extraliminal* to the terms used by the author. Jefferson M. Co. v. Anchoria-Leland M. & M. Co., 32 Colo. 176, 75 Pac. 1070, 1073.

> Locators shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, or ledges, throughout their entire depth, the top, or apex, of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations.

This section is replete with what Judge Lewis, in considering another portion of mining law, characterizes as "grammatical solecisms."[2]

In the language of Dr. Raymond,—

> This phraseology has the merit of clearly conveying the meaning intended, though descriptive geometry and the English language suffer somewhat in the operation. . . . . But the goal is reached, though the vehicle is damaged.[3]

The section clearly grants the following intralimital rights:—

(1) Exclusive dominion over the surface.[4]

(2) The right to certain parts of all veins whose tops, or apices, are found within vertical planes drawn downward through the surface boundaries.[5] The extent to which the locator is entitled to such veins

2 Hobart v. Ford, 6 Nev. 77, 12 Morr. Min. Rep. 236.

3 Law of the Apex, Trans. Am. Inst. M. E., vol. xii, pp. 387, 392.

4 Mullins v. Butte Hardware Co., 25 Mont. 525, 65 Pac. 1004, 1007.

5 Del Monte M. & M. Co. v. Last Chance M. etc. Co., 171 U. S. 55, 88, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; Calhoun Gold M. Co. v. Ajax Gold M. Co., 182 U. S. 499, 508, 21 Sup. Ct. Rep. 885, 45 L. ed. 1200; S. C., 27 Colo. 1, 83 Am. St. Rep. 17, 59 Pac. 607, 50 L. R. A. 209; Campbell v. Ellet, 167 U. S. 116, 119, 17 Sup. Ct. Rep. 765, 42 L. ed. 101, 18 Morr. Min. Rep. 669; Crown Point M. Co. v. Buck, 97 Fed. 462, 465, 38 C. C. A. 278; Mt. Rosa M. & M. Co. v. Palmer, 26 Colo. 56, 77 Am. St. Rep. 245, 56 Pac. 176, 177, 50 L. R. A. 289; Judge Hallett's charge in Matoa G. M. Co. v. Chicago-Cripple Creek G. M. Co., Mining and Scientific Press, vol. 78, p. 374.

within his surface boundaries will depend upon a number of circumstances, to be fully considered in connection with the subject of extralateral rights.

It is quite manifest from a reading of the section that no title passes *by virtue of the location* to any part of any vein which has its top, or apex, wholly outside of the boundaries of such location.

§ 551. The right to the surface and presumptions flowing therefrom.—The exclusive right of possession conferred upon the locator by the statute is as much the property of the locator as the vein or lode by him discovered and located.[6] This is undoubtedly true as between the locator and all others attempting to invade his rights acquired by location. There is a tendency, however, in the general land office and in some of the courts to limit the use of the surface to strictly mining purposes.[7] The right to cut timber growing on a mining claim is limited to the necessity for its use in the working of the mine. A locator would have no right to cut the timber and sell or remove it.[8]

If the location is in a national forest, the locator would not be permitted to establish thereon a hotel, saloon or carry on any business other than mining without the consent of the secretary of agriculture,[9] and that department is said to have the control over the timber growing on an unpatented mining claim in

[6] Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 226, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

[7] United States v. Rizzinelli, 182 Fed. 675, 680.

[8] Teller v. United States, 113 Fed. 273, 281, 51 C. C. A. 230. A homesteader, prior to patent or final entry, has no right to tap trees for turpentine and gum, and may be sued therefor after abandoning his homestead. Parish v. United States, 184 Fed. 590, 592. Such acts are now declared to be misdemeanors. Act of June 4, 1906, 34 Stats. at Large, 208.

[9] United States v. Rizzinelli, 182 Fed. 675, 680.

the national forests.[10] It is well recognized that in the administration of the mineral land laws there is frequently a temptation to locate mining claims for a purpose other than mining, e. g., the control of water to which the land is riparian, securing rights of way for commercial transmission lines without the necessity of proceeding under the right of way acts, and submitting to the conditions imposed by such acts, and the acquisition of strategic points for the development of water-power. In such cases the land department insists on its right to inquire into and determine the good faith of the locator, and this whether application for patent is pending or not.[11] With these possible limitations as to use, the right of exclusive possession and enjoyment of the surface is unquestioned. Whatever may be reserved out of the grant created by the perfection of a valid lode location, one thing is quite manifest. The right of a senior locator to the exclusive possession of the surface cannot be invaded, assuming, of course, that at the time to which the location relates no rights of way or servitudes were imposed upon the land.[12] While, as we shall hereafter see, outside apex proprietors may penetrate underneath the surface in the lawful pursuit of their veins, the law expressly preserves the surface, likewise the subsurface,[13] from invasion.

The only qualification to this rule is the privilege accorded under certain circumstances to junior locators to place the lines of their locations upon or across the senior claim, discussed in previous sections.[14] The

10 Lewis v. Garlock, 168 Fed. 153, 154.

11 In re Yard, 38 L. D. 59.

12 *Ante*, § 531.

13 St. Louis M. & M. Co. v. Montana M. Co., 194 U. S. 235, 237, 24 Sup. Ct. Rep. 654, 48 L. ed. 953.

14 *Ante*, §§ 363, 363a.

use of such privilege is not to be considered an invasion, as no rights can be asserted thereby in hostility to the senior title.

What are the presumptions, if any, flowing from the ownership of the surface?

Prima facie, everything within the vertical bounding planes belongs to the locator.

In the language of Judge Hallett,—

> We may say, that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own boundaries he is regarded as the owner of all valuable deposits until someone shall show a higher right.

While the courts do not altogether agree as to the weight of testimony necessary to overthrow this presumption, there is an undoubted consensus of opinion in support of the above rule.[15]

[15] Boston & Montana Cons. C. & S. M. Co. v. Montana Ore P. Co., 188 U. S. 632, 638, 23 Sup. Ct. Rep. 440, 47 L. ed. 626; St. Louis M. & M. Co. v. Montana M. Co., 113 Fed. 900, 902, 51 C. C. A. 530; S. C., on appeal, 194 U. S. 235, 24 Sup. Ct. Rep. 654, 48 L. ed. 953; Parrot Silver & Copper Co. v. Heinze, 25 Mont. 139, 87 Am. St. Rep. 386, 64 Pac. 326, 329; Maloney v. King, 25 Mont. 188, 64 Pac. 351, 352; Leadville M. Co. v. Fitzgerald, 4 Morr. Min. Rep. 380, 385, Fed. Cas. No. 8158; Doe v. Waterloo M. Co., 54 Fed. 935, 938; Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. 540, 551; Duggan v. Davey, 4 Dak. 110, 26 N. W. 887, 890; Iron S. M. Co. v. Campbell, 17 Colo. 267, 29 Pac. 513; Cheesman v. Shreve, 37 Fed. 36, 37, 16 Morr. Min. Rep. 79; Montana Co., Limited, v. Clark, 42 Fed. 626, 630, 16 Morr. Min. Rep. 80; Cheesman v. Hart, 42 Fed. 98, 103, 12 Morr. Min. Rep. 263; Bell v. Skillicorn, 6 N. M. 399, 28 Pac. 768; Jones v. Prospect Mt. T. Co., 21 Nev. 339, 31 Pac. 642; Maloney v. King, 27 Mont. 428, 71 Pac. 469, 470; Montana Ore P. Co. v. Boston & M. Cons. C. & S. M. Co., 27 Mont. 536, 71 Pac. 1005, 1007; State v. District Court, 28 Mont. 528, 73 Pac. 230, 231; Maloney v. King, 30 Mont. 158, 76 Pac. 4, 5; Heinze v. Boston & M. Consol. C. & S. M. Co., 30 Mont. 484, 77 Pac. 421, 423; Ophir S. M. Co. v. Superior Court, 147 Cal. 467, 82 Pac. 70, 74, 3 Ann. Cas. 340; Grand Central Min. Co. v. Mammoth M. Co., 29 Utah, 490, 83 Pac. 648, 667; S. C., appeal dismissed, 213 U. S. 72, 29 Sup. Ct. Rep. 413, 53 L. ed. 702. See, also, *post*, § 866.

We may safely base our discussion of the more important elements of the law applicable to lode locations upon this presumption, and, as we progress, endeavor to show the circumstances under which, and extent to which, it may be overcome, reaching ultimate conclusions by such gradations as the nature of the subject will permit.

§ 552. Intralimital rights not affected by the form of surface location.—We have heretofore suggested that the ideal location, the one which confers the greatest property rights susceptible of being conveyed under the mining laws, contemplates a surface regular in form along the course of the vein, with end-lines crossing it, substantially presenting the form of a parallelogram.[16] A departure from the ideal, however, if the statutory limit is not exceeded as to area, does not destroy or impair the intralimital rights of a locator. The requirement as to nonparallelism of end-lines affects only the extralimital or, strictly speaking, the extralateral rights.[17] In such cases the right to pursue the vein on its downward course outside of the locator's vertical bounding planes may not exist; but in other respects the locator's right to whatever may be found within such planes is the same as in the case of a location of the highest type. It is unquestionably true that neither the form of the surface location nor the position of the vein as to its course controls or restricts the intralimital rights.

According to Judge Ross,[18] this is the logical deduction flowing from the decision of the supreme court of the United States in the Elgin case.[19]

16 *Ante*, § 360.

17 *Ante*, § 365.

18 Doe v. Waterloo M. Co., 54 Fed. 935, 938.

19 Iron S. M. Co. v. Elgin M. etc. Co., 118 U. S. 196, 206, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98, 5 Morr. Min. Rep. 641.

§ 553. Pursuit of the vein on its course beyond bounding planes of the location not permitted.—Subject to the extralateral right of outside apex proprietors, a locator may be said to own all those parts of such veins having their tops, or apices, within the boundaries as are found within such boundaries. Wherever a vein on its course, or strike, passes out of and beyond any one of these boundaries, the right of the locator to it ceases. Whatever may be his privilege with reference to the pursuit of his vein in depth, longitudinally it cannot be followed beyond any of the boundaries. We have fully explained the rights upon located veins as they were asserted under, and prior to. the passage of the act of 1866.[20] It having been definitely settled by the supreme court of the United States in the Flagstaff-Tarbet case,[21] that under the act of 1866 a locator could not pursue his vein on its strike beyond the lines of his location, the application of the doctrine of that case to locations made under the act of 1872 was natural and logical. The rule may be said to be elementary.[22]

This being true, it follows that no other locator can, in the pursuit of his vein *on its strike*, pass through the bounding plane of a senior location, with the possible exception of the owner of a cross-lode.[23] An entry underneath the surface of a prior location is only permitted in the exercise of a right to pursue a vein on its

20 *Ante*, § 58.

21 *Ante*, § 60; fig. 3, and illustrations with § 586, *post*.

22 Argentine M. Co. v. Terrible M. Co., 122 U. S. 478, 485, 7 Sup. Ct. Rep. 1356, 30 L. ed. 1140; Terrible M. Co. v. Argentine M. Co., 5 McCrary, 639, 89 Fed. 583; Wolfley v. Lebanon M. Co., 4 Colo. 112, 13 Morr. Min. Rep. 282; Patterson v. Hitchcock, 3 Colo. 533, 5 Morr. Min. Rep. 542; Hall v. Equator M. & S. Co., Fed. Cas. No. 5931; New Dunderberg M. Co. v. Old, 79 Fed. 598, 605, 25 C. C. A. 116; Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57, 58, 22 Morr. Min. Rep. 575.

23 *Post*, § 562.

downward course. This suggests the subject of cross-lodes.

Article II. Cross-Lodes.

§ 557. Section twenty-three hundred and thirty-six of the Revised Statutes and its interpretation.
§ 558. The Colorado rule.
§ 559. Cross-lodes before the supreme court of Montana.
§ 560. The Arizona-California rule.
§ 561. The views of the supreme court of the United States.
§ 562. General deductions.

§ 557. Section twenty-three hundred and thirty-six of the Revised Statutes and its interpretation.—As we have observed in a previous chapter,[24] under local rules existing prior to the passage of the act of 1866, as well as under the act itself, the lode was the principal thing granted, and the adjacent surface, if any was actually appropriated, was a mere incident; that only one lode could be held by a single location, and that this could be followed on its course, or strike, wheresoever it might lead, to the lawfully claimed limit, without the necessity of inclosing it within surface boundaries.

Where surface boundaries had been established by the prior locator for the convenient working of his lode, a subsequent locator appropriating a separate vein might pursue it into and through the surface ground of the senior locator, but no one was permitted to invade such surface for the purpose of searching for undiscovered veins.[25]

Such being the recognized rules, it is not difficult to imagine instances of two lodes held in different owner-

[24] *Ante*, § 58.

[25] Atkins v. Hendree, 1 Idaho, 95, 2 Morr. Min. Rep. 328.

ship intersecting or crossing each other on their strike, or onward course, without creating any conflict of title, except at the place of lode intersection or within the space of actual lode crossing.

The act of 1866 made no provision in terms for the determination of rights growing out of such crossings or intersections.

Such were the conditions existing when the act of 1872 was passed, which contained the following provision, now preserved in section twenty-three hundred and thirty-six of the Revised Statutes:—

> Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. . . . .[26]

This is the enunciation of a rule of law, the usefulness of which when applied to the conditions existing at the time of its passage cannot be denied. It established a rule of decision based upon the equitable maxim that "priority in time establishes a priority of right." The application of this provision to locations made prior to its enactment is not involved in any serious embarrassment. It is only where attempts are made to apply the rule to locations made and rights asserted under the act of 1872 that apparent difficulties have been encountered, giving rise to a conflict of opinion and diversity of decision.

Whatever may have been the relationship existing between the lode, which was the subject of location, and the adjacent surface ground under the act of 1866, under the existing law the right to any portion

[26] Act of May 10, 1872, § 14.

of any lode is, as a general rule, dependent upon its having its top, or apex, within the surface boundaries of the location. Of course, there may be exceptions to this rule, as heretofore pointed out. A location overlying the dip of a vein may hold everything within the vertical boundaries, in the absence of an outside apex proprietor with a location which conferred an extralateral right.[27] A regular valid location, once perfected under the law, vests in the proprietor the ownership of not only the lode upon the discovery of which the location is predicated, but of all other lodes the tops, or apices, of which may be found within such surface boundaries or within vertical planes drawn through them. The ownership of such other lodes so found is not made to depend upon their general direction or the position they may occupy with reference to the originally discovered lode.

The only limitation upon the grant authorized by section twenty-three hundred and twenty-two of the Revised Statutes is the extralateral right reserved to other locators to follow lodes having apices within their boundaries, on their downward course, outside of and beyond such boundaries, and underneath adjoining surfaces.

Instances may be conceived where two veins might intersect or cross on their strike outside of vertical planes drawn through the surface lines of the several locations. In other words, lodes may intersect on their strike without the existence of any surface conflict or the invasion of the territory included within vertical planes drawn through surface boundaries.[28]

[27] *Ante*, § 364.

[28] See concurring opinion of Chief Justice Beatty in Wilhelm v. Silvester, 101 Cal. 358, 364, 35 Pac. 997, 998.

To cases of this character the application of the rule under consideration is accompanied with no more difficulty than its application to cross-lodes located under or prior to the act of 1866.

But some difficulty has been encountered by the courts in different jurisdictions in construing section twenty-three hundred and twenty-six of the Revised Statutes and endeavoring to harmonize it with other sections of the mining laws, resulting in a radical conflict of opinion. While time and the progressive interpretation of the general body of the mining laws have induced some of the courts to recede from their original doctrines, closing the breach to some degree, yet there is still a radical difference of opinion upon one of the most important questions arising out of the "cross-lode" conditions which still awaits final adjustment by the supreme court of the United States.

In order to ascertain to what extent the courts are in harmony, and to point out wherein there is still a wide divergence of views, it will be necessary to state the rule in the different jurisdictions, the reasoning upon which such rule is predicated, and the extent to which the supreme court of the United States has given its sanction to one view or the other—or has declined to pass upon either. We may then state the net results in the form of general deductions.[29]

§ 558. The Colorado rule.—The inception of what may be termed the earlier Colorado rule is found in an opinion given by Judge Hallett, sitting as circuit judge in the United States circuit court, district of Colorado, upon a motion to dissolve an injunction in the case of Hall v. Equator Mining and Smelting Co.[30]

[29] *Post*, § 562.

[30] Fed. Cas. No. 5931.

The controversy arose between the Colorado Central lode, owned by the plaintiff, and the Equator lode, owned by the defendant. The Equator was located in 1866. The date of the location of the Central is not

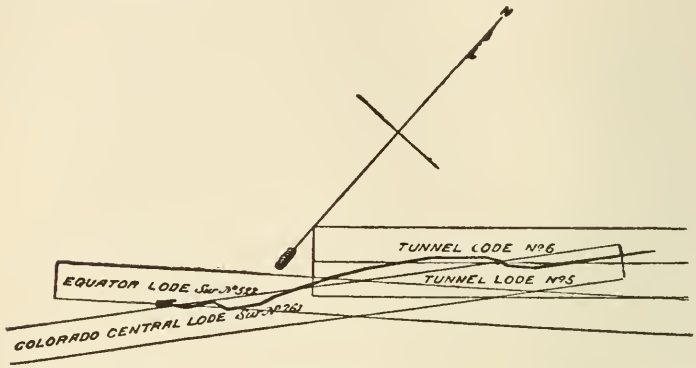


FIGURE 44.

disclosed by the reported decisions; but the court records established the fact that it was discovered November 30, 1872.

Both parties claimed under United States patents issued after the passage of the act of 1872. Plaintiff held the senior patent, based on a junior location. The relative position of the two claims is shown in the diagram (figure 44), *supra*.

The controversy related to a body of ore found in or under the east end of the Central location, and extending thence westward to and across the intersection with the Equator location.

The motion to dissolve the injunction was heard upon affidavits. There was a sharp conflict as to the facts. The learned judge, with respect to the showing made, uses this language:—

As was anticipated when the bill was removed into this court, there is no agreement between the parties as to the structure of the lode or lodes and their outcrop. The affidavits suggest several theories without giving certainty to any of them. There may be two veins uniting in their onward course at some point east of the Central location, and thence going westward as one vein, with an outcrop in that location or south of it. And the vein may be so wide at the top as to enter both locations at the point where this controversy arose. And there may be two veins uniting on the strike or on the dip at the very place in dispute. But as to this, it is only necessary to say, that the facts are not satisfactorily stated to lead to a just conclusion. . . . . It is enough that there is a strong controversy in which the right of neither party clearly appears. On that alone we interfere to preserve the property for him who may at law prove his right to it.

The motion to dissolve the injunction was denied, and the parties were relegated to the action of ejectment, then pending, for a trial of the questions of fact.

The court thereupon proceeds as follows:—

What has been said relates mainly to a question of fact, which it is the opinion of the court should be tried by a jury. Some general remarks in addition, as to the proper construction of the act of congress, may assist the parties in that investigation.

And after "assuming that these are lodes crossing each other in the manner indicated by the locations," the judge enunciates the following doctrine:—

The general language of section twenty-three hundred and twenty-two seems to comprehend all lodes having their tops, or apices, in the territory described in the patent, whether the same lie trans-

versely or collaterally to the principal lode on which the location was made.

Considered by itself, such would be the meaning and effect of that section. But there is another section relating to cross-lodes, which is of different import. It was numbered fourteen in the original act of 1872, section twenty-three hundred and thirty-six, Revised Statutes, second edition, and is as follows: . . . . [Then follows quotation of section twenty-three hundred and thirty-six.] It will be observed, that by this section the first locator and patentee of a lode gets only such part of cross and intersecting veins as lie within the space of intersection, to the exclusion of the remainder of such lodes and veins lying within his own territory. So far, this section is in conflict with section twenty-three hundred and twenty-two, before mentioned, and the matter of precedence between them is settled by an arbitrary rule established long ago. As between conflicting statutes, the latest in date will prevail, so between conflicting sections of the same statute, the last in the order of arrangement will control.[31]

The presumption that one section of a statute was adopted before another seems to be very slight, and perhaps this rule has no other merit than to afford the means of solving a difficult question. But the rule appears to be well established, and to be applicable to the present case. It gives to section twenty-three hundred and thirty-six, Revised Statutes, or section fourteen, as it stood in the original act, a controlling effect over the prior section, and limits the right of the first locator of a mine in and to cross and intersecting veins to the ore which may be found in the space of intersection. If there are in fact two lodes crossing each other in these locations, the plaintiffs, having the elder title by patent, have the

31 Citing Bacon's Abr. Stat. D. Dwarris, 156; Brown v. County Commrs., 21 Pa. 37; Smith v. Moore, 26 Ill. 392.

better right, but it is limited as last stated. So much as to the theory that there are two lodes intersecting in their onward course.

There can be no question but that Judge Hallett, in rendering the foregoing decision, based only upon a hypothetical state of facts and presented in the form of a few "general remarks," exceeded the necessities of the case under consideration.

Upon the trial of the case on the merits, a state of facts was developed entirely different from the hypothesis above assumed. Instead of two lodes intersecting each other in the manner indicated by the locations, there was but *one* lode, with part of its width in one location and part in the other.[32]

Yet a precedent had been established by these "few general remarks" which was for many years recognized in Colorado as controlling, without even a criticism of the logic of its reasoning or a consideration of the circumstances under which the decision was rendered.

In Branagan v. Dulaney,[33] the question arose upon the sufficiency of the answer filed by the defendant, a junior locator, justifying a trespass within the lines of the plaintiff, a senior locator, on the ground that the defendant was the owner of a cross-lode and had a right under Revised Statutes, section twenty-three hundred and thirty-six, to drift through the territory covered by the senior location.

The court below having sustained the demurrer to the answer, judgment passed for plaintiff.

[32] Carpenter's Mining Code, 3d ed., p. 65. See note to 11 Fed. Cas. No. 5931.

[33] 8 Colo. 408, 8 Pac. 669, 670.

On appeal, the supreme court reversed the judgment, basing its decision upon Hall v. Equator (*supra*), and the "arbitrary rule of construction suggested by the court" in that case, and holding, in effect, that the answer stated a complete defense.

This doctrine was followed or sanctioned by the supreme court of Colorado in a number of subsequent cases.[34]

The circuit court of appeals, eighth circuit, in Oscamp v. Crystal River Mining Company,[35] gave its apparent sanction to the doctrine thus enunciated by declining to controvert it, and in a later case invoked it as an aid to the interpretation of the tunnel laws.[36]

It thus appears that a "few general remarks" made by a judge upon a motion for a preliminary injunction, upon a hypothetical state of facts which was subsequently determined to have had no potential existence, ripened into a rule of property, which, when applied to certain localities and conditions found in that state, was productive of unique results. An illustration of the practical application of the rule so long accepted by the supreme court of Colorado is shown by an inspection of the official map of the mining region of Cripple Creek in that state.

[34] Lee v. Stahl, 9 Colo. 208, 11 Pac. 77, 78, 13 Colo. 174, 22 Pac. 436, 438, 16 Morr. Min. Rep. 152; Morgenson v. Middlesex M. & M. Co., 11 Colo. 176, 17 Pac. 513, 514; Omar v. Soper, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443, 447, 15 Morr. Min. Rep. 496; Coffee v. Emigh, 15 Colo. 184, 25 Pac. 83, 85, 10 L. R. A. 125.

[35] 58 Fed. 293, 296, 7 C. C. A. 233.

[36] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. 200, 210, 13 C. C. A. 390.

In figure 45 we reproduce from that map a quarter section of land, upon the surface of which mining

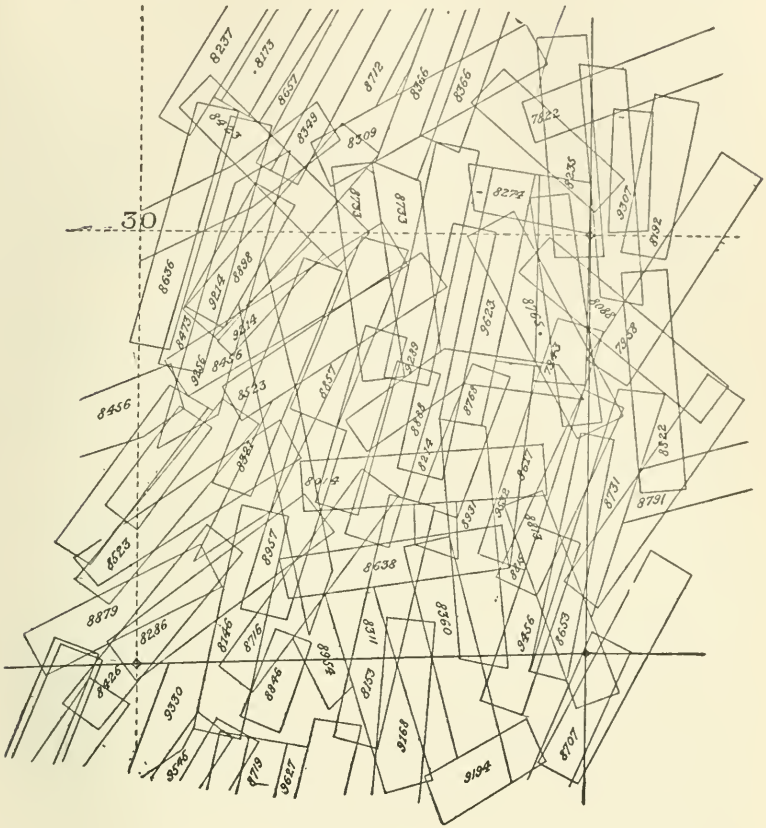


FIGURE 45.

claims have been officially surveyed, many of which have been patented, overlapping in the manner indicated.[37]

[37] While the rule, the practical operation of which is intended to be illustrated in figure 45, has been in some degree modified by the cases hereafter referred to, yet the illustration is still applicable to the modified rule, which denies to the junior cross-locator the ownership of the

The rule thus enunciated established two principles:—

(1) The owner of the junior cross-lode was the owner of so much of his cross-vein as was found within the vertical boundaries of the senior location, except the ore within the space of actual *vein* intersection. The ore within this space belonged to the senior locator. In other words, that portion of the cross-vein within the senior locator's boundaries on each side of this space of vein intersection was excepted out of the grant to the prior locator;

(2) The owner of the junior cross-lode had a right of way through this space of vein intersection, and, being the owner of the remainder of the cross-vein, of course could work it within the boundaries of the senior claim.

This rule remained practically undisturbed in Colorado, though frequently challenged, from the year 1879 (the date of Judge Hallett's ruling in Hall v. Equator, *supra*), until 1898, when Judge Lunt, district judge of El Paso county, in that state, in the case of Ajax Gold Mining Company v. Calhoun Gold Mining Company,[38] had the courage to decline to follow the long line of decisions of the supreme court of his state, thus rendering himself liable to the charge of judicial insubordination. As to this Judge Lunt thus expressed himself:—

cross-vein within the boundaries of the prior location, but permits him to drift through the senior claim. Besides this, the complexities shown in the figure are certain to arise to a greater or less degree from the practical application of the rule permitting junior locators to place the lines of their claims upon or across those of a senior claim, fully discussed in previous sections (*ante*, §§ 363, 363a). The contrast between the situation disclosed in figure 45 and that flowing from a different interpretation of the law in other jurisdictions will be observed by comparing figure 45 with figure 50 (*post*, § 560).

[38] Reported in full in 1 Leg. Adv., p. 426.

A very strenuous effort was made by the counsel for the plaintiff to induce the court to deny this right upon the ground that Hall v. Equator Mining etc. Co., 11 Fed. Cas., p. 222, No. 5931, Morr. Min. Rights, 282, 3d ed., 1879, Branagan v. Dulaney, 8 Colo. 408 (1885), 8 Pac. 669, and the Colorado cases based thereon, were not, at the time they were rendered, carefully considered, do not express the true and just interpretation of the United States act, and should be disregarded. I am frank to say that an extensive attempt on my part to obtain a consensus of the opinion of the legal profession, especially those who are prominent in mining law, has convinced me that a very general desire exists in the profession to have this question again presented to the supreme court, based upon the belief that after a more careful consideration and examination of this all-important question of title, the supreme court may reconsider its former opinion and fall in line with the apparently more just rule of the courts of California and Arizona. By reason of this opinion of the bar, and it must be expressly understood that without any intention whatever of presuming to lightly disregard and overrule a decision of the supreme court, I shall decide against what is known as the "Colorado rule" of cross-veins, with the hope and expectation that the question will be finally determined and the very general feeling of doubt as to the rule within the profession set at rest. I feel fortified in my opinion by the language of the chief justice on page 405, in the case of Argonaut etc. Co. v. Turner, 23 Colo. 400,[39] where the significant use of the word "perhaps" is apparent, and also by the opinion of Mr. Morrison, given in his work on cross-veins, and again from the information given me as to the consideration given to the case of Branagan v. Dulaney, and also by the comments on Hall v.

[39] 58 Am. St. Rep. 245, 48 Pac. 685, 686.

Equator etc. Co. in first Lindley,[40] section 558, and the California and Arizona cases.[41]

The facts of the case which called forth the opinion may be illustrated by reference to a diagram (figure 46) which accompanies the opinions of the supreme court of Colorado and the supreme court of the United States, to be hereafter referred to.

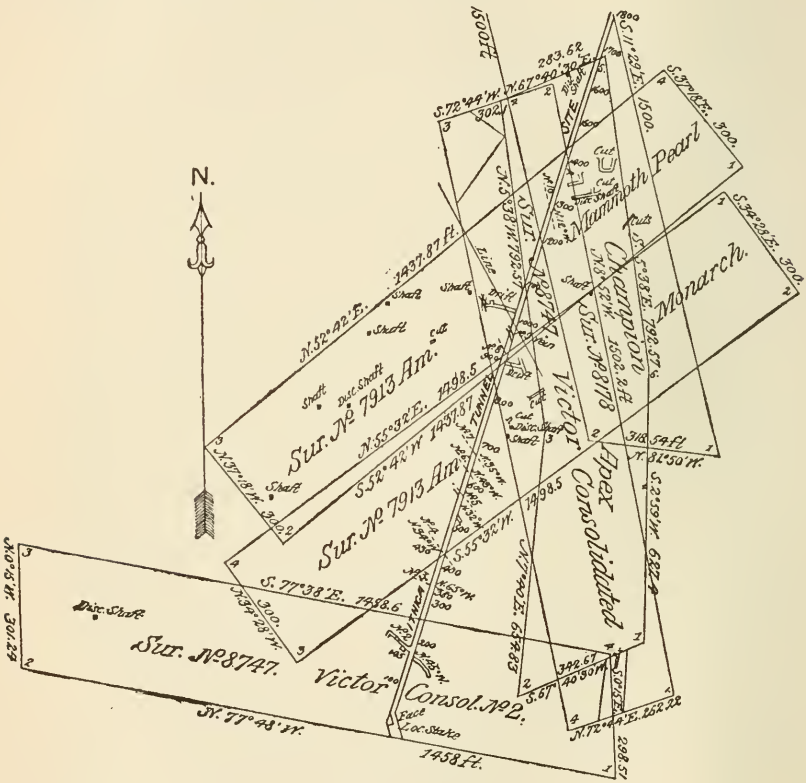


FIGURE 46.

The Ajax company owned the Monarch, Mammoth Pearl, and Ajax lode claims, and the Calhoun company

40 1st edition.

41 1 Legal Adv., p. 432. See *post*, § 560.

owned the Ithaca tunnel-site and the Victor Consolidated lode. All the claims of the Ajax company were prior to the tunnel-site and lode claim of the Calhoun company. The outcrop of the vein in the Victor Consolidated, it was assumed, followed practically the course of the Victor side-lines and passed through the north and south end-lines of the claim, necessarily crossing the Monarch and Mammoth Pearl claims of the Ajax company and the veins therein. As to these two last-named claims, the Victor vein was therefore essentially a cross-vein.

The questions considered by the court, so far as the subject now under discussion is concerned, were as follows:—

(1) Whether or not the Ithaca tunnel is entitled to a right of way through the Mammoth Pearl and Monarch claims;

(2) Whether or not the Calhoun company has acquired by virtue of said tunnel and tunnel-site location the ownership of the blind veins cut therein,—to wit, veins or lodes not appearing on the surface and not known to exist prior to the date of location of said tunnel-site;

(3) Whether or not the Calhoun company is the owner of and entitled to the ore contained in the vein of its Victor Consolidated claim within the surface boundaries and across the Monarch and Mammoth Pearl.

Judge Lunt held:—

(1) That the Calhoun company had no right to drive the Ithaca tunnel underneath the surface of the Mon-

arch and Mammoth Pearl claims, and its further prosecution must be enjoined;

(2) The Calhoun company could not acquire by virtue of the tunnel and tunnel-site location the ownership of any blind veins within the Monarch and Mammoth Pearl locations. All such veins passed to the owners of these claims by virtue of the priority of their location;

(3) As a corollary to this, the Calhoun company is not the owner of any of the ore found in the Victor Consolidated claim underneath the surface of the Mammoth Pearl and Monarch claims, and must pay the value of such ore extracted to the Ajax company.

The judge adds (italics are ours):—

> If the defendant *desires to follow* its alleged Victor Consolidated cross-vein as a cross-vein to the veins of the Mammoth Pearl and Monarch claims, it will not be entitled to any ore within these claims from the point where its cross-vein enters the Mammoth Pearl claim (on the south) until it leaves the north side-line of the Mammoth Pearl and again enters its own territory of the Victor Consolidated lode claim.

From this we infer that in Judge Lunt's opinion the cross-lode locator has a right to follow the vein through the senior location,—yielding the ore therein encountered to the owner of the latter,—but he could not, as we have already shown, reach the cross-vein by means of a crosscut tunnel (such as the Ithaca tunnel).

The supreme court of Colorado sustained Judge Lunt in all of these rulings, accepting gracefully his apology for reversing the former decisions of that court.[42]

[42] Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 59 Pac. 607, 611, 50 L. R. A. 209.

As to the right of way to which the junior cross-lode locator might be entitled, the court was clearly of the opinion that this was reserved to him, to be exercised within or on the vein, the "space of intersection" being held to mean the intersection of the *claims* and not *vein* intersection.

The case was taken to the supreme court of the United States on writ of error, and the decision of the supreme court of Colorado was affirmed, with the exception of that part of it which dealt with the right of way reserved to the junior cross-lode locator. As to this question the court declined to express an opinion, as it was not necessarily involved.[43] We will have occasion to again recur to this decision.[44]

§ 559. Cross-lodes before the supreme court of Montana.—The subject of cross-lodes came before the supreme court of Montana in the case of Pardee v. Murray.[45] This case involved a controversy between the Salmon, located in 1866, and the Cliff Extension, No. 2, located in 1867, on the one hand, and the Shark Town and Scratch All lodes, discovered and located in 1875. The relative position of the claims of the contending parties is shown in figure 47.

The court thus expressed its views as to the meaning of the section of the Revised Statutes under consideration:—

> If a vein with a prior location crossed another, such vein would not disturb the possession of the

[43] Calhoun G. M. Co. v. Ajax G. M. Co., 182 U. S. 499, 504, 21 Sup. Ct. Rep. 885, 45 L. ed. 1200.

[44] *Post*, § 561.

[45] 4 Mont. 234, 2 Pac. 16, 18, 15 Morr. Min. Rep. 515.

subsequent location, except as to the extent of the cross-vein, and would entitle the prior location to the ore and mineral contained in the space of intersection. If with a subsequent location, the locator would be entitled only to a right of way to the extent of his cross-vein, for the purpose of working his mine, and to no other right; and if he should take the ore contained in the space of intersection, he would be a trespasser against whom the prior locator in possession of the surface ground might maintain an action of trespass.

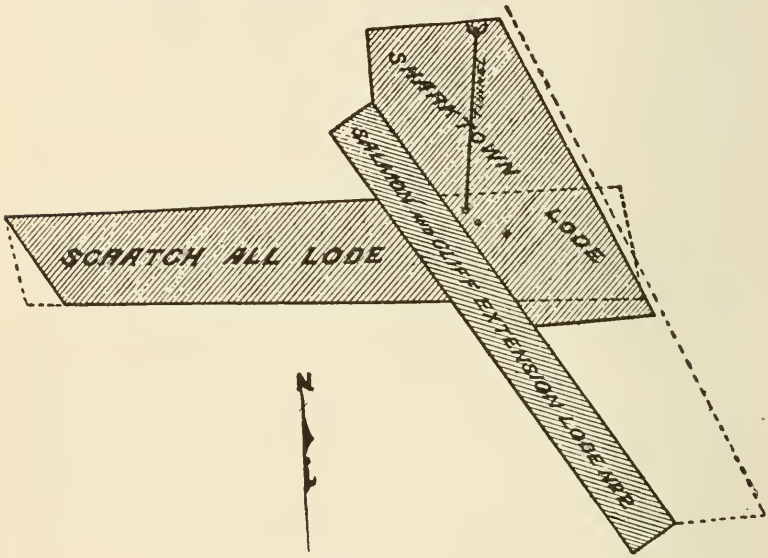


FIGURE 47.

This suggests the view adopted by Mr. Morrison in his "Mining Rights,"[46]—

That a cross-lode takes no estate in the claim it crosses, and has no rights as against the crossed claim, except the mere right to drift through, leaving all the ore as the property of the crossed claim.

[46] 10th ed., p. 127, 14th ed., p. 177.

This, as we have seen, is the rule ultimately adopted by the supreme court of Colorado.

§ 560. The Arizona-California rule.—A case arose in Arizona out of the following facts, which are illustrated by a diagram, which we here reproduce as figure 48.

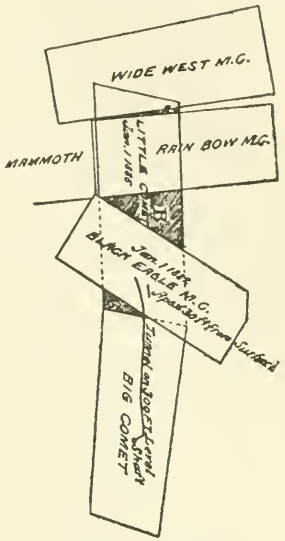


FIGURE 48.

The Black Eagle was the prior location, based upon the discovery of a vein having a southeast and northwest course. The Big and Little Comet are locations covering a vein with a course approximately north and south, the owners of which, through means of a tunnel originating in the Big Comet, had penetrated underneath the Black Eagle surface, justifying their right to do so under section twenty-three hundred and thirty-six of the Revised Statutes, claiming the Comet vein to be a cross-vein. The surface conflict area is shown on the diagram. The earlier Colorado rule was urged in support of their contention.

The supreme court of Arizona declined to follow the original doctrine of the Colorado courts, and in a well-considered opinion[47] asserts that,—

> The construction urged and supported by the Equator and subsequent Colorado decisions violates the language of the statute, injects into it things not there, results in conflict in the statute among its parts, and makes infinitely more complex the old system of lode claims.

[47] Watervale M. Co. v. Leach, 4 Ariz. 34, 33 Pac. 418, 424.

With reference to cases arising under the act of 1872, the rule announced in Arizona recognizes the controlling force of surface boundaries, and denies the right to the junior locator of a so-called cross-lode to invade the domain of the senior claimant for any purpose. Says the court:—

> Section twenty-three hundred and twenty-two gives, not the lode alone, but all lodes, veins, and ledges, throughout their entire depth, the top, or apex, of which lies inside of the surface lines of the claim extended downward vertically; and as lodes may dip, so that, when followed, they may be found to extend beyond the boundaries of the claim, congress further provides that they may nevertheless be followed. In other words, congress has said to the miners, "Comply with the requirements that we impose, and the government of the United States will grant absolutely to you a piece of the earth bounded at the surface by straight lines, distinctly marked, and by planes extending through those lines to the center of the earth; and you shall have all lodes of mineral-bearing rock whose apex is within these boundaries." This is simple, plain, and the miners' rights are thereunder easy of ascertainment.

The opinion of the court is elaborate, and a clear exposition of the law from its standpoint. The court fails to see any conflict between the different sections of the law, and thus denies the necessity for invoking the rule of statutory construction applied by Judge Hallett.

The position assumed in this decision compels the owners of lodes located under the act of 1866 to adverse the application for patent filed by one asserting rights to an overlapping surface location. The right of the first locator to pursue his so-called cross-lode into the overlapping claim is lost by failure to adverse.

This is in harmony with the rule in Colorado[48] only so far as it affected the right to the ore at the space of intersection.

In California it has been held that, as to ledges, rights to which accrued prior to the act of May 10, 1872, the act itself reserves them without the necessity of adversing,[49] and the supreme court of Utah, by a divided court, coincides with the views announced in California;[50] but as to locations made subsequent to 1866, the supreme court of California agrees with the supreme court of Arizona.

The question presented to the California court[51] arose out of an attempt to locate a so-called cross-lode over the surface of a prior location. The conflict between the two is illustrated in figure 49, the New Idea being prior in point of time.

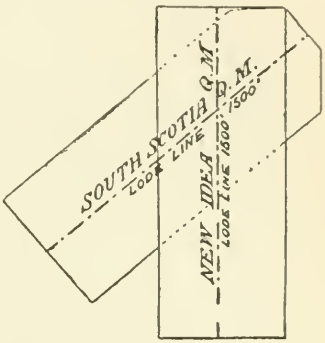


FIGURE 49.

In an elaborate opinion, written before the Arizona decision was published, the California court reached the same conclusion as that enunciated by the supreme court of Arizona.

Commenting on the Colorado rule, the supreme court of California asserts,—

> That it would leave the rights of prior locators in the greatest confusion; their property interests in their claims would be undefined, and the result

[48] Lee v. Stahl, 13 Colo. 174, 22 Pac. 436, 437, 16 Morr. Min. Rep. 152; 9 Colo. 208, 11 Pac. 77, 78.

[49] Eclipse G. & S. M. Co. v. Spring, 59 Cal. 304.

[50] Blake v. Butte Silver M. Co., 2 Utah, 54, 9 Morr. Min. Rep. 503.

[51] Wilhelm v. Silvester, 101 Cal. 358, 35 Pac. 997.

would be ruinous litigation and perhaps personal conflicts.[51a]

Chief Justice Beatty, whose wide judicial experience in mining litigation in Nevada and California, in both trial and appellate courts, is a matter of current history, writes a concurring opinion, embodying forcible reasons for the rule announced by the court.

He says:—

> There is no proposition in geometry plainer or more easily demonstrable than this: that surface locations on cross-veins may be so made as not to conflict, while at the same time the portions of the veins included in or covered by the respective locations will intersect in depth—in some cases within the surface lines of one or the other location extended downward vertically, and in other cases altogether without the surface lines of both locations. This results from the fact that veins generally, if not universally, descend into the earth not vertically, but at a greater or less inclination or dip.[51b]

Chief Justice Beatty's view is, that the law under consideration was intended to meet the conditions assumed by him, an underground crossing or intersection of two veins on the strike or dip, without any surface conflict between the two locations.

We have endeavored to present the case assumed by him on figure 49A, an isometrical projection exhibiting two veins intersecting on their strike, or partly on the strike and partly on the dip, the plane of intersection being to some extent within the extralateral right of both claims, but without any conflict at the surface.

[51a] Id., 35 Pac. 999.

[51b] Wilhelm v. Silvester, 101 Cal. 358, 35 Pac. 997, 999.

While the illustration is necessarily imperfect, owing to the difficulty of presenting such conditions by the method of perspective, yet it serves to demonstrate the persuasive force of the chief justice's views. This construction of the law disposes of the necessity of harmonizing supposed conflicts between different sections of the statute, giving operation and effect to all its provisions.

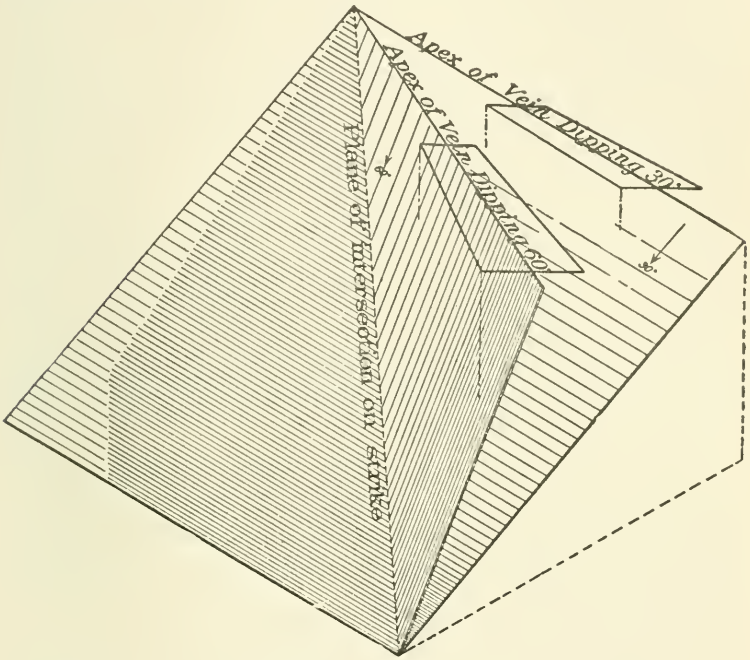


FIGURE 49A.

The practical application of the Arizona-California rule is shown in the accompanying figure 50, which represents a quarter section of land covered by official mining surveys in the Grass Valley region of the latter state, in which locality the California case arose.

A comparison of this figure with the one illustrative of the Colorado rule, shown on page 1233, illustrates the radical difference between the two doctrines. The irregularly shaped surfaces shown in the California illustration are accounted for by patenting a number of claims in one group, showing only the exterior lines of the composite, a practice at one time followed by the land department. Under the existing rules, group surveys preserve the interior lines of all individual locations embraced therein.

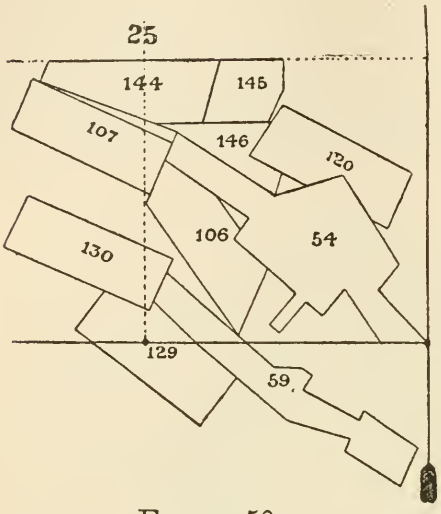


FIGURE 50.

The Arizona-California rule denies to the junior cross-lode locator the ownership of any part of the cross-vein within the boundaries of the senior location. The later Colorado decisions accept this as a correct exposition of the law.

As to any right of way reserved to the junior cross-lode locator through the senior crossed claim, there was no discussion in the California case, but it is quite manifest that the analysis by the court of the federal mining laws and its expressed views therein negative the idea that a junior locator has any such right of way.

In the Arizona case this question was necessarily involved, as the entry by the junior cross-lode claimant

(the Little Comet, on figure 48, *ante*) was by means of a tunnel or drift along the so-called cross-vein. The decision denies the right of the junior cross-lode locator to enter within the limits of the prior location.

§ 561. The views of the supreme court of the United States.—The supreme court of the United States, in reviewing the decision of the supreme court of Colorado in Calhoun Gold M. Co. v. Ajax Gold M. Co.,[52] specifically considered each of the questions passed upon by both Colorado courts, and in affirming the judgment approved the views announced in the Arizona-California-Montana cases and the Colorado case under review, to the effect that the senior locator owns all veins, whether appearing on the surface or blind, found within his location, and a junior cross-lode claimant has no right to any ore found within the boundaries of the senior location. It also sustained the view of the courts below, which denied the right of the tunnel locator to penetrate the bounding planes of the senior location.

As to the right of way problem, it said:—

> Section 2336 imposes a servitude upon the senior location but does not otherwise affect the exclusive rights given the senior location. It gives a right of way to the junior location. To what extent there may be some ambiguity; whether only through the space of the intersection of the veins, as held by the supreme courts of California, Arizona, and Montana, or through the space of intersection of the claims, as held by the supreme court of Colorado in the case at bar. It is not necessary to determine between these views. One of them is certainly correct, and therefore the contention of the plaintiff in error is not correct, and, more than that, it is not necessary

[52] 182 U. S. 499, 505, 21 Sup. Ct. Rep. 885, 45 L. ed. 1200.

to decide on this record. A complete interpretation of the sections would, of course, determine between these views, but on that determination other rights than those submitted for judgment may be passed upon, and we prefer, therefore, to reserve our opinion.

The general rule announced by that court that the grant by a mining patent preserves the subsurface of a mining claim from invasion except the right given to an outside apex proprietor to follow underneath on the downward course of his vein[53] would seem to negative any right of way through a senior claim for any purpose.

§ 562. General deductions.—We may here recapitulate the net result obtained from a consideration of all the adjudicated cases on the subject of cross-lodes.

All courts now agree upon the following propositions:—

(1) The grant to the senior locator is of *all* veins the apices of which are found within his location, regardless of their course, and whether they were previously known to exist or were blind and undiscovered. There is no limitation implied, and the grant is exclusive. A junior cross-lode locator has no right to any ore found upon the cross-vein within the boundaries of a senior claim;

(2) The owner of a junior tunnel-site cannot by means of a crosscut tunnel penetrate within the boundaries of a senior claim for any purpose.

As to what rights of way the owners of junior located veins may have as against senior claimants where the veins intersect or cross, it may be said that

[53] St. Louis M. & M. Co. v. Montana M. & M. Co., 194 U. S. 235, 238, 24 Sup. Ct. Rep. 654, 48 L. ed. 953.

all courts agree that where two veins cross on their dips, the senior takes all the ore within the space of vein intersection and the junior has a right of way through the space. The same may be said of veins crossing on their strike or course where there is no surface conflict between the locations, as illustrated in figure 49A.

But where there is a surface conflict, and there are cross-lodes and cross-locations such as were considered in the various cases heretofore illustrated, there is a disagreement.

In Colorado and Montana the junior cross-lode claimant has a right to drift through the senior claim, following the cross-vein, yielding the ore encountered to the senior locator.

In California and Arizona he has no such right. We think that the logical inferences which may be drawn from the decisions of the supreme court of the United States are in favor of the California-Arizona rule.

CHAPTER III.

THE EXTRALATERAL RIGHT.

ARTICLE I. INTRODUCTORY.

II. EXTRALATERAL RIGHTS ON THE ORIGINAL LODE UNDER PATENTS ISSUED PRIOR TO MAY 10, 1872.

III. EXTRALATERAL RIGHTS FLOWING FROM LOCATIONS MADE UNDER THE ACT OF MAY 10, 1872, AND THE REVISED STATUTES.

IV. CONSTRUCTION OF PATENTS APPLIED FOR PRIOR, BUT ISSUED SUBSEQUENT, TO THE ACT OF 1872.

V. LEGAL OBSTACLES INTERRUPTING THE EXTRALATERAL RIGHT.

VI. CONVEYANCES AFFECTING EXTRALATERAL RIGHT.

ARTICLE I. INTRODUCTORY.

§ 564. Introductory.

§ 565. Origin and use of the term "extralateral."

§ 566. The "dip right" under local rules.

§ 567. The right to pursue the vein in depth, prior to patent under the act of July 26, 1866.

§ 568. Nature of estate in the vein created by grant of the dip or extralateral right.

§ 564. Introductory.—The extralimital rights of a lode locator, other than the right to pursue the vein on its downward course out of and beyond his vertical bounding planes, are few and comparatively unimportant. The right to locate and hold a millsite in connection with a located lode under the first clause of section twenty-three hundred and thirty-seven of the Revised Statutes may be said to be extralimital. It is wholly dependent upon lode ownership. A loss of the lode location by forfeiture or abandonment would undoubtedly destroy the right to the associated millsite, unless it had thereon a quartz-mill or reduction works,

when an entry might be made thereof under the second clause of that section.

But the selection of a millsite is an independent act.[1] It is a *privilege* which may or may not be exercised. The same may be said of the permission granted under the various laws of congress to cut timber for mining purposes upon public lands, which is a mere transitory privilege, not to be classified distinctively as a *right*.[2]

The principal right which may be exercised beyond the surface boundaries of a lode location is that which is now commonly designated by the term "extralateral."

In determining the nature and extent of this right, it will be necessary to consider not only the provisions of the Revised Statutes, but also the act of July 26, 1866. As we have heretofore observed,[3] to a considerable extent this act and the titles predicated upon it are brought into connection, and are at least partly blended with the later, or present, legislative system and the titles held thereunder.

§ 565. Origin and use of the term "extralateral."— The word "extralateral" does not appear in any of the standard dictionaries. We are indebted to Dr. Raymond for its introduction into the mining literature of the period.[4] Its etymological signification is ob-

[1] *Ante*, § 521.

[2] The privilege of cutting timber from the public lands, both mineral and nonmineral, is not confined to locators, or even owners, of mining claims. Under regulations prescribed by the secretary of the interior or the secretary of agriculture in the national forests, it may be enjoyed by a large class of people. It is a subject not so intimately associated with the mining laws as to warrant any extended treatment in the text.

[3] *Ante*, § 60.

[4] Law of the Apex, Trans. Am. Inst. M. E., vol. xii, p. 387.

vious. Its application, to denote the right to pursue a vein on its downward course, outside of and beyond vertical planes drawn through the side-lines of a lode location, into and underneath the surface of adjoining or contiguous land, affords us a simple and comprehensive term with which to express a somewhat complex idea. The phrase "right of lateral pursuit," employed by Mr. Willard Parker Butler,[5] is an equivalent. Either expression, when used in connection with the federal mining laws, is free from ambiguity and sufficiently explicit.

§ 566. The "dip right" under local rules.—The "dip right" of the early miner was the forerunner of the modern extralateral right. Whether, in framing their local regulations on this subject, the pioneers of the west drew their inspiration from the traditions of early German customs, which sanctioned the inclined location,[6] received their suggestions from mining on "rake veins" in Derbyshire,[7] or were induced to provide for following their vein on its dip indefinitely, on the consideration that the miner might obtain more that was valuable by this method than any other, is not at this late day necessary to inquire.

The fact remains that ever since the discovery of the auriferous quartz veins of California, the "dip right" in some form has been an all-important attribute of the ownership of lodes and lode locations. The local regulations which established and governed this right, as well as all others during that period, were not framed with serious regard to precision of expression. The locator was entitled to so many linear feet on the lode,

[5] School of Mines Quarterly, July, 1886.

[6] *Ante*, § 43.

[7] *Ante*, § 8.

in whatever direction it might be found to run, "together with all the dips, spurs, angles, and variations of the vein."

Sometimes additions were made to this vocabulary. For example, the miners of Reese River, Nevada, provided that,—

> Each claimant shall be entitled to hold by location two hundred feet on any lead in the district, with all dips, spurs, and angles, offshoots, depths, widths, variations, and all mineral and other valuables therein contained.[8]

These terms were supposed to be comprehensive enough to take laterally and in depth what the miner failed to obtain longitudinally. Much controversy arose in the early days over rights asserted under the claim to "spurs"; but, generally speaking, the extent and character of the "dip right" were well understood and recognized. The exercise of the right was not defined specifically by bounding planes. As a rule, no surface lines were marked, and no surface occupant ever thought of contesting the privilege of a lode claimant of following his vein underneath such surface. Such privilege was sanctioned by the "American common law of mining for the precious metals."[9]

Where surface boundaries were established, as they sometimes were, they were not looked upon as controlling any rights upon the located lode, either in length or depth.[10]

If there were disputes as to the common bounding plane between two claimants on a lode, they were

[8] J. Ross Browne's Mineral Resources, 1867, p. 247.

[9] King v. Edwards, 1 Mont. 235, 4 Morr. Min. Rep. 480.

[10] *Ante*, § 59.

usually adjusted by common consent, or resulted in consolidation of interests and the establishment of a common system of development. The law reports covering this period are barren of cases touching this subject.

As to whether or not end-lines defining underground rights on the vein were inferred, or that these should be drawn across the lode at a right angle, or at any other angle, to the course of the lode at the surface, is a matter over which there has been considerable controversy at the bar, and concerning which there is some difference of opinion. Lodes did not then, any more than now, pursue a uniform course. The first locator on a continuous vein might comply with the rectangular suggestion, but a claimant locating a part of the same vein some distance removed from the original locator, at a point where the vein had changed its course, would be compelled to accommodate himself to local conditions, leaving intermediate locators with end-lines either converging toward or diverging from those established by one or the other of the previous locators.

Whatever may be said of the rule of implied end-lines of locations made under the act of July 26, 1866, and their direction with reference to the course of the vein, it cannot be demonstrated that any specifically defined rule was embodied in the written district regulations during the period when local rules and customs held unquestioned sway.

The nature and extent of the dip right, as established and recognized by the local customs of miners during the period antedating legislation by congress, were substantially as above indicated.

§ 567. **The right to pursue the vein in depth, prior to patent under the act of July 26, 1866.**—Section four of the act of July 26, 1866, contained the following provision:—

> No location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same, as fixed by local rules. . . . .

This act was but the crystallization of the miners' rules and customs.[11] It in no respect enlarged the right of the claimant beyond that which the rules of the mining district gave him.[12] It restricted the locator to one lode,[13] but made no provision for the establishment of surface boundaries as *an act of location.*

We are instructed by Judge Field that, although not in terms mentioning end-lines, such were necessarily implied.[14]

Where surface land was appropriated in connection with a linear location on the ledge, it was intended solely for the convenient working of the mine, and did not measure the miner's right, either to the linear feet upon its course or to follow the dips, angles and variations of the vein.[15]

[11] Jennison v. Kirk, 98 U. S. 453, 457, 25 L. ed. 240, 4 Morr. Min. Rep. 504; Broder v. Natoma Water Co., 101 U. S. 275, 276, 25 L. ed. 790, 5 Morr. Min. Rep. 33; Blake v. Butte S. M. Co., 2 Utah, 54.

[12] Eureka Case, 4 Saw. 323, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578.

[13] Id.; Eclipse G. & S. M. Co. v. Spring, 59 Cal. 304, 306; Walrath v. Champion M. Co., 63 Fed. 552, 556.

[14] Eureka Case, 4 Saw. 323, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578.

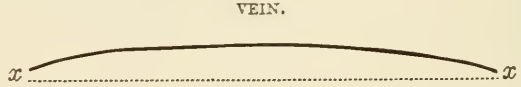
[15] *Ante*, § 58.

The line of the location, the number of linear feet claimed along the course of the vein, measured his right as to length.

While the act clearly granted the privilege of pursuing the vein in its downward course, there was no attempt at defining the bounding planes which limited the right.

While, as heretofore observed, end-lines may have been inferred, for the simple reason that the miner's pursuit of the vein on its strike must cease at some point, the direction to be given to the lines and the angle at which they were to be drawn with reference to the course of the vein were not necessarily inferred. We have the highest authority for the statement that these end-lines were not required to be parallel.[16]

Judge Field said in the Eureka case that lines drawn vertically down through the ledge, or lode, *at right angles* with a line representing its general course at the ends of the claimant's line of location, will carve out, so to speak, a section of the ledge, or lode, within which he is permitted to work, and out of which he cannot pass. If the general course is to be considered as a straight line connecting the linear extremities of the location, indicated thus,—



by the dotted line, *x*-*x*, the application of Judge Field's

[16] Eureka Case, 4 Saw. 323, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578; Iron S. M. Co. v. Elgin M. Co., 118 U. S. 196, 208, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98, 15 Morr. Min. Rep. 641; Walrath v. Champion M. Co., 63 Fed. 552, 556; Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. 540, 550, 18 Morr. Min. Rep. 113; Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. 597, 599; S. C., on appeal, 83 Fed. 658, 669, 28 C. C. A. 333.

rule would necessarily result in a parallelism of end-lines, which he says is not required. If each end-line of each location is to be drawn at right angles to the local trend, as indicated at the respective points where the linear measurement on the vein begins and ends, they never could be parallel, except in the case of ideal veins pursuing a uniform course.

A practical illustration of this was exhibited during the trial in the United States circuit court, ninth circuit, northern district of California, of the case of the Carson City Gold and Silver Mining Company v. North Star Mining Company.[17]

The North Star mine was located prior to the passage of the act of 1866. It was a consolidation of a

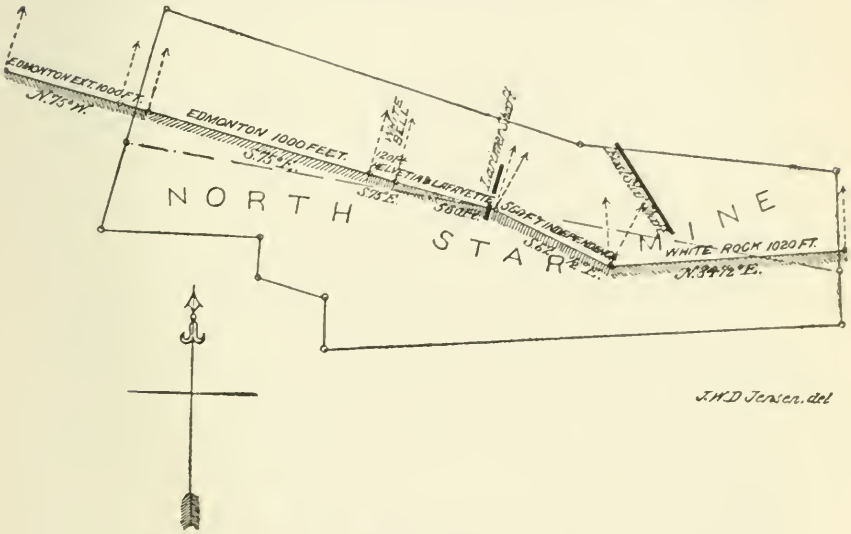


FIGURE 51.

number of claims on the same vein, aggregating thirty-one hundred linear feet.

[17] 73 Fed. 597, 601; S. C., on writ of error, 83 Fed. 658, 28 C. C. A. 333.

A casual inspection of this composite shows that the extreme end-lines are practically at right angles to the *local* strike across which they are drawn, but are not parallel to each other. The vein dipping to the north made these lines convergent. Had it descended into the earth in an opposite direction, the end-lines would have been divergent. If lines were drawn at right angles to the local course at the extremities of each series of locations within the composite, a triangular underground segment, e. g., between the Independence and White Rock, would have occurred, owing to a change in the course of the vein.

While we may concede, for the purpose of argument, that the theory of the law of 1866, which was but the expression in a higher form of the rules and customs of the miners, was to give to the miner only so much of the vein underneath as he had appropriated upon the surface, the act did not define in what manner the bounding planes were to be established. The method suggested by Judge Field, applied to the ideal lode, would accomplish this result, the lines being parallel. The same object would be gained by drawing parallel lines across the vein at any angle. The truth is manifest. The act is crude and imperfect. Congress never anticipated the numerous intricate questions which might possibly arise under it, and the courts were compelled to exhaust their ingenuity in construing it so as to prevent the destruction of the large property interests which had grown up under the system of local rules which congress intended to perpetuate through the medium of congressional law.

What we have thus far said with regard to dip rights under the act of 1866 applies only to unpatented claims located under the act. The proceedings culminating

in a patent gave greater precision to the location, and, as a rule, definitely fixed that which theretofore was more or less uncertain.

There are but few instances at the present time of mining claims originating under this act which have been continuously perpetuated without applying for a patent.

Our object in presenting a review of the law was simply to show the historical evolution of the present extralateral right.

§ 568. Nature of estate in the vein created by grant of the dip or extralateral right.—Before proceeding to a detailed discussion of the nature and extent of the extralateral right as sanctioned by the legislation of congress, it is of considerable importance that we understand the underlying theory upon which the right is based. A proper conception of this theory will, in our judgment, materially aid us in reaching a correct solution of some of the complicated questions arising out of this element of the federal law.

In discussing some of the incidents of the ownership of veins, or of land containing them, the courts frequently refer to the common-law rule of property, and in commenting upon that feature of the American mining law which awards under certain conditions the right to the pursuit of a vein outside of and beyond vertical planes drawn through the surface boundaries, draw the conclusion that this so-called extralateral right is in contravention of the common law. Strictly speaking, this is inaccurate. The grant of the right of lateral pursuit is, in legal effect, a severance of the estate in the vein from the ownership of the soil into which it penetrates after passing on its downward

course beyond the vertical planes drawn through the surface boundaries of the location or patent.[18]

The vein in its descent passing out of and beyond vertical planes drawn through the surface boundaries embracing the apex is as much a part of the location as if entirely within its surface lines.[19]

A vein properly located is part and parcel of the location within which it is embraced, throughout its entire length, within the limits defined by law, even though on its downward course it enters an adjacent location.[20]

The ownership and possession of the vein at the surface carries with it all that pertains to the location.[21]

Third parties having no interest in an existing valid location of a mining claim can predicate no claim or right whatever to veins or lodes, the tops, or apexes, of which lie within the lines of such existing locations, either by discovery or location, for the all-sufficient reason that such veins or lodes are already, whether previously explored or not, subject to the claim of the owners of the existing prior location.[22]

It is quite true, as aptly said by Mr. Justice Brewer in the Del Monte case, that were it not for the provisions of the federal statutes patents for land contain-

[18] Waterloo M. Co. v. Doe, 82 Fed. 45, 50, 27 C. C. A. 50, 19 Morr. Min. Rep. 1.

[19] Tyler M. Co. v. Last Chance M. Co., 90 Fed. 15, 21, 32 C. C. A. 498.

[20] Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57, 58, 22 Morr. Min. Rep. 575. See, also, State v. District Court, 28 Mont. 528, 73 Pac. 230, 235.

[21] Last Chance Min. Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 579, 583, 66 C. C. A. 299; *certiorari* denied, 200 U. S. 617, 26 Sup. Ct. Rep. 754, 50 L. ed. 622.

[22] Golden Link M. L. & B. Co., 29 L. D. 384.

ing minerals would be subject to the ordinary rules of the common law.[23]

But it does not follow that a grant of the vein in depth beyond the vertical boundaries is a grant which is repugnant to the common law. Every mining location carries with it the common-law attributes of ownership.[24]

The government being the owner of the fee may carve from it the ownership of the vein. It may grant the surface to one and the vein to another.

There was nothing in the common law which prohibited this severance. In fact, it was expressly sanctioned, as we have heretofore shown.

Nothing was more common than to sell or demise a piece of land, excepting the mines, and when the surface and underlying mines or the different strata of the subsoil were differently owned, they were separate tenements, with all the incidents of separate ownership—a distinct possession and distinct inheritance.[25]

Therefore, when the government grants a vein throughout its entire depth within certain end-line planes, the title to the vein between these planes is severed out of the adjoining land into which it penetrates, and the estate in the land overlying the dip is to that extent lessened. Instead of being in derogation of the common law, this class of grants is in absolute harmony with it. It is not true, therefore, that the statute should be strictly construed because it contravenes the common law.

[23] Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 66, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[24] St. Louis M. & M. Co. v. Montana Co., Ltd., 113 Fed. 900, 902, 51 C. C. A. 530; S. C., on appeal, 194 U. S. 235, 24 Sup. Ct. Rep. 654, 48 L. ed. 953; Mammoth M. Co. v. Grand Central M. Co., 213 U. S. 72, 29 Sup. Ct. Rep. 413, 53 L. ed. 702.

[25] *Ante*, § 9, and authorities cited in notes.

> The primary thought of the statute is the disposal of the mines and minerals, and in the interpretation of the statute this primary purpose must be recognized and given effect.[26]

Its construction should be "fair and natural."[27] This dip or extralateral right is not a mere easement. The estate thus granted in the vein is of the same dignity as that of a title in fee. It *is* a title in fee as to the vein granted. As was said by the supreme court of Pennsylvania,—

> We have for nearly half a century judicially regarded the ownership of mineral where it has been severed from the surface as the ownership of land to all intents and purposes.[28]

This grant of the fee in the vein may be accompanied by certain easements. To illustrate: The right to follow the vein into adjoining lands frequently cannot be exercised without disturbing some portion of the inclosing rock.[29] The grant of the vein necessarily carries with it whatever is reasonably required for its enjoyment and without which the grant would be ineffectual. But the estate in the granted vein is a fee simple estate.

The act of 1866 was in effect a proclamation severing veins and lodes of the character specified from the body of the public domain. It was the announcement

[26] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 66, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[27] Id.

[28] Lillibridge v. Lackawanna Coal Co., 143 Pa. 293, 24 Am. St. Rep. 544, 22 Atl. 1035, 1036, 13 L. R. A. 627. See *post*, § 812.

[29] It is not to be inferred from this that the owner of the location containing the apex is at liberty to approach the outside parts of his vein through the land of others. He must follow his vein or reach it through property belonging to himself. St. Louis M. & M. Co. v. Montana Ltd., 113 Fed. 900, 902, 51 C. C. A. 530. See *ante*, § 490a; *post*, § 615.

of a governmental policy, whereby ledges within the earth were to be considered as distinct entities, and to be dealt with as such in administering the public land system.

This policy has never been entirely changed. In the main it is as much a part of the existing system as it was of the one which it succeeded.

Article II. Extralateral Rights on the Original Lode under Patents Issued Prior to May 10, 1872.

§ 572. The right to patent under the act of 1866, and its restriction to one lode.
§ 573. The functions of the diagram and the surface lines described in the patent as controlling rights on the patented lode.
§ 574. Rights of patentee under the act of 1866, where the end-lines converge in the direction of the dip.
§ 575. Rights where the end-lines diverge in the direction of the dip.
§ 576. Under the act of 1866, parallelism of end-lines not required—Doctrine of the Eureka case.
§ 577. The Argonaut-Kennedy case.
§ 577a. Application of rectangular planes in cases of converging end-lines under act of 1866.

§ 572. The right to patent under the act of 1866, and its restriction to one lode.—The act of July 26, 1866, contained the following provision:—

> Whenever any person or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing

claim, it shall and may be lawful for said claimant or association of claimants to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein, or lode, with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

In another portion of this work we have commented upon the construction given to this section by the land department, and have there illustrated some of the results flowing from the earlier attempts to administer the law.[80]

While the method of location sanctioned by this act has long since passed into history, and we are not necessarily called upon to speculate upon the subject of dip rights as applied to individual claims prior to patent beyond the historical summary outlined in a preceding section, there is left us a legacy of numerous patents issued under the provisions of the repealed law, which, to some extent at least, demands serious attention. We shall always have these patents with us. While for many years they have existed unobtrusively, in recent times, particularly in the older quartz camps of California, a revival of the mining industry has brought them to light, and the attention of the courts is directed to the adjustment of controversies arising out of rights asserted under them. They are entitled to more than a passing consideration. It is not to be expected that we should anticipate every possible question that may arise out of the peculiar form of some of these early patents. Our purpose is

[80] *Ante*, § 59, figs. 1 and 2.

to establish, if possible, the general rules of construction, to be applied to them as affecting the dip or extra-lateral right, but not to suggest grounds of attack or defense in individual cases, unless the points involved have heretofore forced themselves upon the notice of the courts.

We are to construe these patents at present solely in the light of the act under which they were issued, without regard to any supplemental or additional rights conferred upon their owners by virtue of the act of May 10, 1872. They granted but one lode,[31] which we call the original, to distinguish it from other lodes which might be ultimately discovered within the surface limits. These patents uniformly contained the following restrictive clause:—

> The grant hereby made is restricted to one vein, or lode, with the surface ground; to wit, the ——— ledge, upon which the required improvements are found; and that any other vein, or lode, should such be discovered within the above described lot of land, shall be, and hereby is, expressly excepted and excluded from these presents.[32]

§ 573. The function of the diagram and the surface lines described in the patent as controlling rights on the patented lode.—It is unnecessary to elaborate what

[31] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 64, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370; Walrath v. Champion M. Co., 171 U. S. 293, 305, 18 Sup. Ct. Rep. 909, 43 L. ed. 170.

[32] Although the patent was confined to the one lode, from which it might be inferred that all other lodes discovered within the patented area remained the property of the United States, yet the surface could not be invaded by third parties for the purpose of prospecting for other veins. The existence of such other veins was required to be known before an entry could be made for the purpose of locating it in hostility to the patentee. Atkins v. Hendree, 1 Idaho, 107, 2 Morr. Min. Rep. 328.

we have heretofore noted in the historical portion of this work with reference to the effect of a patent issued under the act of 1866, upon the right to pursue the vein on its course.[33] We are now dealing with the pursuit of the vein in depth. The diagram required to be filed defined with certainty the linear extent of the miner's claim upon the lode. It also gave precision to the extent of surface which he was permitted to take in connection with the lode, under the local rules in force in the district. Where these rules fixed a uniform width of so many feet on each side of the vein, the diagram as prepared, and the patent as subsequently issued, presented upon the surface a symmetrical figure in the form of a parallelogram. In many districts, however, no definite area was fixed. In such cases, the claimant was authorized to select, adjoining his lode or some portion of it, such a quantity of surface as was reasonably necessary for his use in connection with the proper working of his vein. This was construed to mean ground for dumpage purposes, the erection of mills, the deposit of tailings, and other purposes connected with the conduct of mining operations, and resulted in passing to patent surface areas of all conceivable forms.[34] The boundaries were frequently fixed without regard to the course of the vein, nor was it originally contemplated that in fixing them they should control the miner's rights upon his discovered vein.[35] This came to him as a revelation after patents were issued and the courts commenced to construe them. Frequently, during the pendency

[33] *Ante*, § 59.

[34] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 64, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[35] Eureka Cons. M. Co. v. Richmond M. Co., 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578.

of patent proceedings, adverse claims intervened, causing diminution of the area as shown upon the posted diagram, producing irregularity of form where, as originally applied for, it was regular. In many instances no regard was paid to the direction given to the lines which we call end-lines, marking the linear limits on the located lode. There was nothing in the letter of the law requiring the locator to treat this as an essential requirement.

These circumstances produced four classes of patents:—

First—Those which defined a small surface area upon which the improvements were situated, the length of the lode claimed being represented by a line produced as shown in the case of the Idaho mine, in figure 1 (on page 98);

Second—Those whose end-lines were substantially parallel, crossing the lode, as shown in the case of the Providence mine, a diagram of which is shown in a succeeding section;[36]

Third—Those whose end-lines crossed the lode, but converged in the direction of the dip;

Fourth—Those wherein such lines crossed the lode, but diverged in the direction of the dip.

Those of the first class are few in number. We are not aware that they have been involved in any controversy beyond that suggested in the Idaho-Maryland case in a preceding section.[37] They are relatively unimportant.

Patents of the second class conform to the ideal standard, and present no possible ground for discussion.

[36] *Post*, § 593, fig. 81.
[37] *Ante*, § 59.

The third and fourth classes, particularly the latter, require serious consideration.

§ 574. Rights of patentee under the act of 1866, where the end-lines converge in the direction of the dip. While the later development of the law on the subject of extralateral rights under the act of 1866 as announced by the courts may justify awarding an extralateral right in all cases, whether the so-called end-lines converge or diverge, by the application of planes at the terminal points of the vein within the location, at right angles to the vein, a subject to be hereafter discussed,[38] it requires no argument to determine the minimum extent of the extralateral right to which the locator is entitled, in the case of convergence. In all the adjudicated cases involving this question it was assumed by both parties to the litigation that the lines crossed by the lode at the extremities of the locations performed the full function of end-lines, defining both surface rights and underground rights on the vein. The attitude of the courts in dealing with cases involving diverging end-lines and the reasons assigned for awarding an extralateral right by rectangular planes may, when the question is directly raised and insisted upon, be applied to cases of converging end-lines. We will recur to this subject after we shall have discussed cases involving divergent lines. Our attention has not been called to the precise case where a patent describing a claim with converging lines was issued prior to the passage of the act of May 10, 1872, but there are several instances where patents were issued upon proceedings instituted while the act of July 26, 1866, was still in force. The patent issued to the Wyoming mine, in Nevada county,

[38] *Post*, § 577a.

California, which was involved in the case of Consolidated Wyoming Mining Co. v. Champion Mining Co.,[39] was of this class. While the problem is so simple that illustration is almost superfluous, we present, in figure 52, a diagram showing the surface boundaries of the Wyoming mine and the course of the lode, which crossed the two lines *a-x* and *f-g*, which lines intersected the terminal points of the vein within the location.

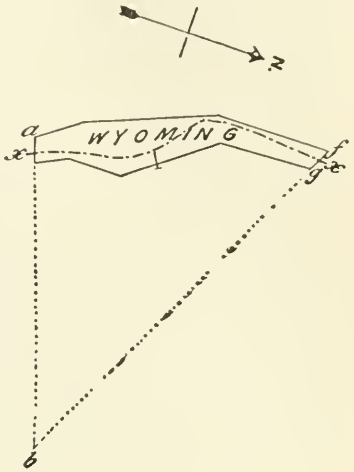


FIGURE 52.

Vertical planes drawn through these lines, produced in the direction of the dip, indicated by the arrow, gave to the patentee the segment of the vein indicated in horizontal projection on the diagram by the triangle *a-b-g*.

It was practically conceded by the litigating parties in this case, that whatever rights the Wyoming company might have had prior to its application for patent, when it had its claim surveyed by the United States surveyor, and permitted him to give the terminal-lines the direction indicated, it was estopped under its patent from any further claim outside of the lines which were fixed by the surveyor; that as vertical planes drawn downward through these lines, produced in their own direction, intersected along a perpendicular line represented by the point *b*, the extralateral right ceased at this line of intersection.

[39] 63 Fed. 540, 18 Morr. Min. Rep. 113.

This concession gave to these lines the full function of end-lines under the act of 1872. The rectangular theory of bounding planes under the act of 1866 was not raised, discussed or considered by the court.

The only other instances wherein locations or patents with converging end-lines have thus far, to our knowledge, engaged the attention of the courts are similar cases, where the rights originated under the act of 1866, the application for patent having been pending at the date of the passage of the act of 1872, under which last-named act patents were issued. These may be noted.

On figure 25, section 318, page 721, is represented the patented surface area of the North Star mine with converging end-lines. In this case it was earnestly urged that as the patent was issued under the act of 1872, which provided that the end-lines should be parallel, the North Star was not entitled to follow its vein on the downward course out of and beyond the vertical boundaries.

Judge James H. Beatty, commenting on this divergence, said:—

> That the end-lines are not parallel cannot be the basis of an objection, because their convergence, when extended in the direction of the dip of the vein, would give defendant less, instead of more, than the law provides for.[40]

This decision was affirmed by the circuit court of appeals.[41]

[40] Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. 597, 602.

[41] Carson City G. & S. M. Co. v. North Star M. Co., 83 Fed. 658, 669, 28 C. C. A. 333, 19 Morr. Min. Rep. 118; *certiorari* was denied by the supreme court of the United States, 171 U. S. 687, 18 Sup. Ct. Rep. 940.

The supreme court of California, while approving *arguendo* the ultimate conclusion reached by Judge Beatty, did not wholly concur in the reasoning.[42]

It was also held in the North Star case, in the trial as well as the appellate court affirming the judgment, that the act of 1866, under the provisions of which the patent was applied for, and under which the locations were made, did not require parallelism of end-lines.[43]

The case of Central Eureka M. Co. v. East Central Eureka M. Co. is practically parallel to the North Star case. It involved, among other questions, the right of the Central Eureka company, claiming under a patent issued after the passage of the act of 1872, based upon locations made under the act of 1866, the end-lines of which converge in the direction of the dip, to follow its vein underneath a junior patented agricultural tract—the Toman ranch. The facts of the case are illustrated on the accompanying diagram (figure 53). The trial court upheld the asserted right. The decision was affirmed by the supreme court of California[44] and by the supreme court of the United States.[45]

We think it can be plausibly asserted that the object and intent of the act of 1872, in so far as it required parallelism of end-lines as a condition precedent to the exercise of the extralateral right, and as applied to locations made subsequent to its passage, was to prevent the locator in following his vein downward from

[42] Argonaut M. Co. v. Kennedy M. Co., 131 Cal. 15, 29, 82 Am. St. Rep. 317, 63 Pac. 148, 153, 21 Morr. Min. Rep. 163.

[43] Carson City G. & S. M. Co. v. North Star M. Co., 83 Fed. 658, 669, 28 C. C. A. 333, 19 Morr. Min. Rep. 118.

[44] 146 Cal. 147, 79 Pac. 834, 9 L. R. A., N. S., 940.

[45] 204 U. S. 266, 27 Sup. Ct. Rep. 258, 51 L. ed. 476.

acquiring a greater length underneath the surface than he had at the surface.[46] If this may be said of the act of 1872, certainly no less can be said of the prior act which made no provision that the end-lines should be parallel.

Neither a location nor a patent with converging end-lines falls within the reason of the rule. There can be little doubt that extralateral rights may be enjoyed under locations made or patents issued under either act where the end-lines converge in the direction of

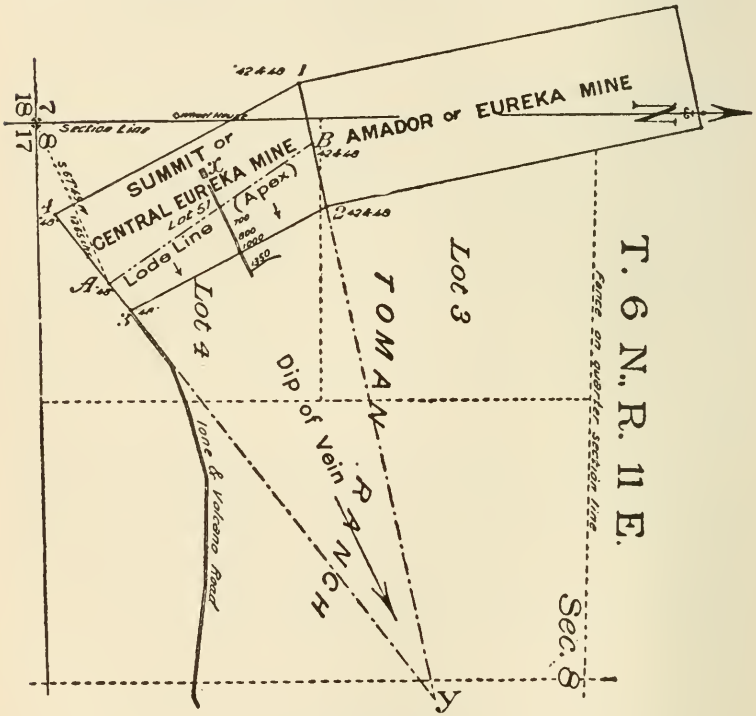


FIGURE 53.

[46] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 85, 18 Sup. Ct. Rep. 598, 43 L. ed. 72, 19 Morr. Min. Rep. 370; Doe v. Sanger, 83 Cal. 203, 213, 23 Pac. 365.

the dip of the vein, giving the locator or patentee less in length on the vein beneath the surface outside of his vertical boundaries than he has at the surface. When the reason of the rule ceases, so should the rule itself.

It is unnecessary to here discuss the force and effect of a patent issued upon proceedings commenced and undetermined at the time the act of 1872 was passed. We shall have occasion to consider this subject in a subsequent section.[47]

§ 575. Rights of patentee under the act of 1866 where the end-lines diverge in the direction of the dip. The reports do not, so far as we have been able to discover, present any adjudicated case where a patent had been issued under the act of 1866, defining a surface location with end-lines diverging in the direction of the dip of the patented vein. The only cases which afford any light upon the subject, and which may be used as a basis of discussion, involved in a greater or less degree the application of the act of 1872, as the patents were issued subsequent to the passage of that act, upon either entries or locations made under the earlier act.

It is manifest that under any location or patent purporting to grant a claim with end-lines diverging in the direction of the dip, such grant, if valid, will convey to the patentee more of the vein in length beyond the side-lines than the locator has within the surface boundaries. It is conceded that such a grant, where the divergence is substantial, would, as to locations made under the act of 1872, be limited in its operation to the vertical boundaries of the claim. Our purpose is to ascertain, if possible, what rule should be applied to patents issued upon claims originating

[47] *Post*, § 604.

under the prior law, which was entirely silent upon the subject of both end-lines and side-lines, the form of the surface having been a matter under the exclusive control of the local districts.

As the courts cannot convey to a patentee more than his patent lawfully covers, they cannot deprive him of anything legally embraced within it. The sole question involved is, What passes by such a patent? We are not particularly concerned with the phraseology of that instrument. The land department is but an agent of the government, and its powers can only be exercised within the limits fixed by the act. The patent cannot be broader than the law.

It may be assumed that the instrument of conveyance describes the surface boundaries, and grants the tract thus described, together with the vein or lode to the distance expressed in linear feet, which may be assumed to represent the length at the surface between the two terminal-lines, and throughout its entire depth between the terminal-line planes extended in their own direction.

There are three possible solutions of the problem:—

(1) The patentee is entitled to so much of the vein throughout its entire depth as is found within vertical planes drawn through the end-lines extended in their own direction, regardless of the fact of their divergence in the direction of the dip; or

(2) As, by the direction given to the terminal-lines, the claimant has asserted a right to more linear feet of the vein in depth than he has included within the surface boundaries, therefore he shall have none of the vein beyond the vertical planes drawn through the surface boundaries; in other words, the patentee's

rights are exclusively intralimital, as in the case of irregular locations under the act of 1872;[48] or

(3) As the theory of the act was that the patentee should have only the number of linear feet claimed and patented throughout its entire depth, the grant is effectual for all that part of the vein found between the extended vertical terminal-line planes which also lies between vertical planes established at the two extremities of the linear distance on the vein measured at the surface at right angles to the general course of the vein at the surface within the location.

The task of the courts in the solution of this problem is undoubtedly surrounded by many embarrassments, arising out of the meagerness of the statute itself, and the difficulty of ascertaining what, if any, was the rule and guide of the miner as established by custom. These district customs were by no means entirely uniform in all the districts upon any particular question, and we fail to find in any of the regulations or customary laws anything which specifically defines the underground rights as between coterminous mining proprietors on the same vein. The courts have been compelled, so far as they have thus far attempted to solve the question, to read between the lines of the statute and ascertain the intent as a matter of implication, and in doing this to determine, if possible, what was the spirit and intent of the local customs.

To arrive at the net judicial result thus far reached, it is essential to consider what principles cognate to the question under consideration have been practically settled and how far an application of these principles may aid in the solution of the problem.

However plausible may be the reasoning in support of one or the other of the suggested methods, no solu-

[48] *Ante*, § 552.

tion will be accepted that is not in consonance with principles which have received the highest judicial sanction or that does violence to the settled rules of interpretation.

§ 576. Under the act of 1866, parallelism of end-lines not required—Doctrine of the Eureka case.—There is probably no single case found in the books which is more familiar to the mining practitioner than the one generally known as the "Eureka case,"[49] tried before Justice Field and Judges Sawyer and Hillyer, three of the most eminent mining judges of the west. The opinion written by Justice Field has always been regarded as a judicial classic. Therein was announced the first judicial definition of the words "lode" and "vein," subsequently adopted by the supreme court of the United States, and reannounced by the courts of last resort in all the mining states and territories. We are presently concerned with so much of the opinion only as affects the subject of the dip or extralateral right as applied to mining claims acquired under the act of July 26, 1866.

The facts and issues in controversy may be illustrated by a diagram (figure 54) accompanying the opinion, to which has been added some details obtained from the maps used at the trial.

For illustrative purposes, we have produced the easterly end-lines of the At Last and Margaret claims in the direction of the dip, as indicated by the dotted line *z-z'*.

A cross-section showing the structural conditions of this lode is shown in figure 9 (page 651). The vein, or zone, was very wide in some places. The surface

[49] 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578.

outcrop appeared in the Champion, At Last, and Margaret, or Lupita, showing the existence at the sur-

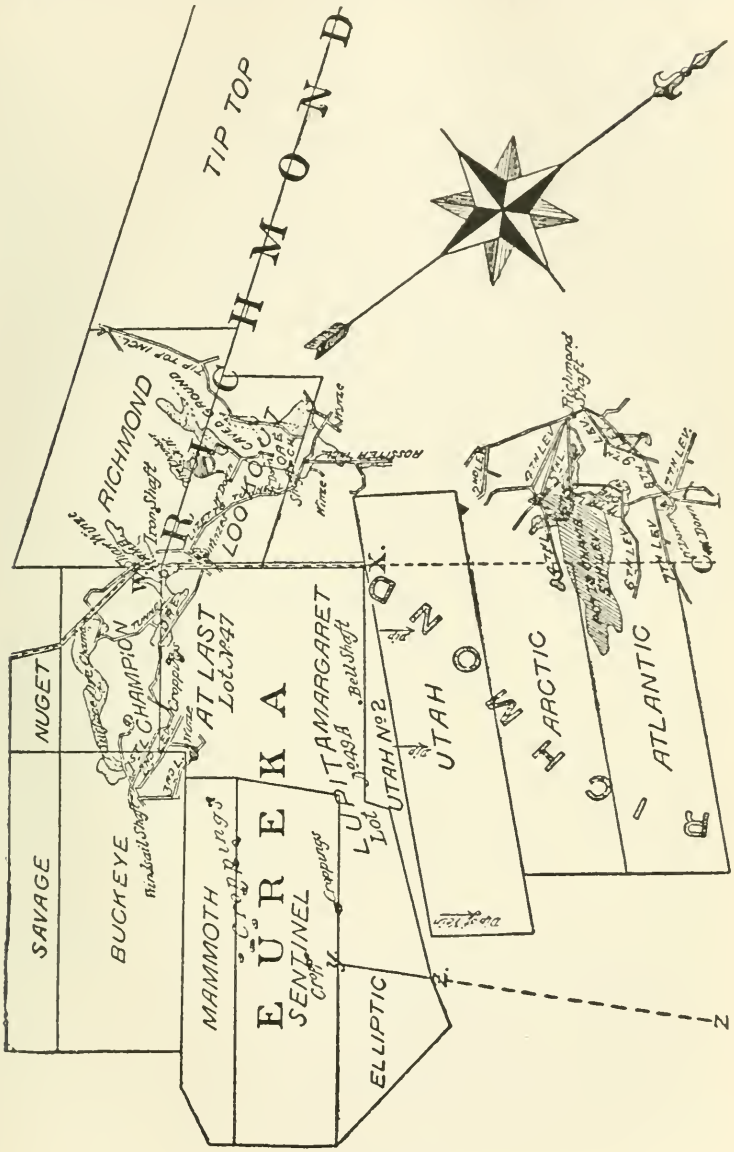


FIGURE 54.

face of a broad vein with part of the apex in each location.

The Eureka company, plaintiff in the case, asserted the right to so much of the "Potts Chamber" as lay to the east of a vertical plane drawn through the west end-lines of the Champion, At Last, and Margaret claims, produced,—that is, the line W-X-C.

Objection was taken by defendant to the validity of the patents to the two claims last named, because the end-lines of the surface locations as patented were not parallel, as required by the act of 1872, both patents having been issued subsequent to the passage of the act. When the locations were made upon which the patents were based does not appear in the opinion of Judge Field; but in the decision of the supreme court of the United States, to be hereafter referred to, it is stated that the locations were made prior to April, 1871.[50] It must be noted that the Eureka company, as plaintiff in the case, was compelled to affirmatively establish its right to the ore bodies in dispute. Therefore, the extent of its extralateral right was necessarily involved. While there was also in the case the element of an agreed compromise line, the principal part of the opinion is devoted to a consideration of the rights asserted by the respective parties, regardless of the agreed line. We quote so much of the opinion of the court as deals with this particular branch of the case:—

> Within the end-lines of the locations, as patented in all these cases, when drawn down vertically through the lode, the property in controversy falls. Objection is taken to the validity of the last two patents, because the end-lines of the surface loca-

[50] Richmond M. Co. v. Eureka M. Co., 103 U. S. 839, 841, 26 L. ed. 557, 9 Morr. Min. Rep. 634.

tions patented are not parallel, as required by the act of 1872; but to this objection there are several obvious answers.

In the first place, it does not appear upon what locations the patents were issued. They may have been, and probably were, issued upon locations made under the act of 1866, *where such parallelism in the end-lines of surface locations was not required.* The presumption of the law is, that the officers of the executive department specially charged with the supervision of applications for mining patents and the issue of such patents did their duty; and in an action of ejectment mere surmises to the contrary will not be listened to. If, under any possible circumstances, a patent for a location without such parallelism may be valid, the law will presume that such circumstances existed. . . . .

In the third place, the defect alleged does not concern the defendant, and no one but the government has the right to complain.

When the case reached the supreme court of the United States on writ of error, the writing of the opinion was assigned to Chief Justice Waite. Among the facts stated by the court we find the following (italics are ours):—

The particular mining ground in dispute is situated within the zone of limestone which has been described and within planes drawn vertically through the end-lines of the Champion claim as patented to the Eureka company and within planes drawn vertically down through the extreme points of the patented locations of the At Last and the Margaret claims, at right angles to the course or strike of the zone, and produced so as to follow its dip. The top, or apex, of the zone is within the surface lines of the *patents* to the Eureka company, and the zone dips at right angles to its course, and on such a dip extends under the surface of the Arctic and Utah claims.

In deciding the case the court said:—

> Upon the face of the *patents*, the United States has granted to the Eureka the right to all veins, lodes, and deposits the tops, or apices, of which lie on the inside of its surveys as patented, throughout their entire depth and wherever they may go, provided it keeps itself within the end-lines of the surveys. The findings that the ground in dispute is within the end-lines, and that the apex is within the surface, settles the rights of the parties between themselves, as well under their *patents* as under their compromise agreement.[51]

The rule that under the act of 1866 end-lines were not required to be parallel has been repeatedly reasserted, not only by the supreme court of the United States, but by other courts. This will appear from the following excerpts collated from the decisions:—

> Under the act of 1866 parallelism in the end-lines of a surface location was not required.[52]
>
> Under the act of 1866 parallelism of end-lines was not required.[53]
>
> The location was made under the law of 1866 which did not require parallelism of end-lines.[54]
>
> When these locations were made (1866) there was no law requiring such parallelism.[55]
>
> The act of 1866, under the provisions of which the patent in this case was applied for, and under which

[51] Richmond M. Co. v. Eureka M. Co., 103 U. S. 839, 847, 26 L. ed. 557, 9 Morr. Min. Rep. 634.

[52] Iron S. M. Co. v. Elgin M. & S. Co., 118 U. S. 196, 208, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98—opinion by Justice Field. Followed in East Central Eureka M. Co. v. Central Eureka M. Co., 204 U. S. 266, 269, 27 Sup. Ct. Rep. 258, 51 L. ed. 476.

[53] Walrath v. Champion M. Co., 63 Fed. 552, 556.

[54] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. 540, 550, 18 Morr. Min. Rep. 113.

[55] Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. 597, 599; affirmed on appeal, 83 Fed. 658, 28 C. C. A. 333, 19 Morr. Min. Rep. 118.

> the rights of defendant in error accrued, did not require parallelism of end-lines.[56]

The same doctrine was practically reiterated by the supreme court of the United States in the Del Monte case.

In speaking of the act of 1872, which in specific terms required end-lines to be parallel, Justice Brewer for the court said:—

> There is no inherent necessity that the end-lines of a mining claim should be parallel; yet the statute [act of 1872] has so specifically prescribed.[57]

From which the inference is irresistible that parallelism is not essential, unless the statute so declares, which the act of 1866 did not.

In the case of the Argonaut Mining Co. v. Kennedy M. & M. Co., a case to be hereafter analyzed, it was strenuously contended that this doctrine had been subsequently repudiated by the supreme court of the United States, but this contention was overruled by the supreme court of California.[58]

The principle is thus established beyond question that under the act of 1866 end-lines of a surface location were not required to be parallel.

There is another statement by Judge Field in the Eureka case to be considered,—viz., that neither the form nor extent of the surface area claimed in connection with the lode controlled the rights in the located lode. It did not measure the miner's rights either to

[56] Id. (C. C. A.), 83 Fed. 658, 669, 28 C. C. A. 333, 19 Morr. Min. Rep. 118.

[57] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 67, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[58] 131 Cal. 15, 28, 82 Am. St. Rep. 317, 63 Pac. 148, 21 Morr. Min. Rep. 163.

the linear feet upon its course or to follow the dips, angles, and variations of the vein.[59]

Yet when the vein was in fact inclosed by surface boundaries the locator could not follow it on its course beyond those lines.[60]

Judge Field, speaking of the local rules before the court in the Eureka case, said:—

> What the miners meant by allowing a certain number of feet on a ledge was that each locator might follow his vein for that distance on the course of the ledge, and to any depth within that distance. So much of the ledge he was permitted to hold as lay within vertical planes, drawn downward through the end-lines of the location, and could be measured anywhere by the feet on the surface. If this were not so, he might, by the bend of his vein, hold under the surface along the course of the ledge double and treble the amount he could take on the surface. Indeed, instead of being limited by the number of feet prescribed by the rules, he might, in some cases, oust all his neighbors and take the whole ledge. No construction is permissible which would substantially defeat the limitation of quantity on a ledge, which was the most important provision in the whole system of rules.[61]

The precise meaning of the language above quoted—"If this were not so, he might, by the bend in his vein, hold under the surface along the course of the ledge double and treble the amount he could take on the surface. Indeed, instead of being limited by the number of feet prescribed by the rules, he might, in some

[59] Eureka Case, 4 Saw. 302, 323, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578. See, also, Golden Fleece v. Cable Cons. Co., 12 Nev. 312, 328, 1 Morr. Min. Rep. 120.

[60] *Ante*, § 60.

[61] Eureka Case, 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578.

cases, oust all his neighbors and take the whole ledge''—is not altogether clear when construed in the light of his declaration that end-lines were not required to be parallel, and his subsequent conclusions,—

> That both defendant and the plaintiff, by virtue of their respective patents, whether issued upon locations under the act of 1866 or under the act of 1872, were limited to veins or lodes lying within planes drawn vertically downward through the end-lines of their respective locations; and that each took the ores found within those planes at any depth in all veins or lodes the top or apex of which lay within the surface lines of its locations. . . . .
>
> Inasmuch as the ground in dispute lies within planes drawn vertically downward through the end-lines of the plaintiff's patented locations, our conclusion is, that the ground is the property of the plaintiff, and that judgment must be for its possession in its favor.

As part of the apex was in both the At Last and Margaret, and as their end-lines were not parallel, but diverged in the direction of the dip, these conclusions would seem to warrant the deduction that the locator takes all of the vein within the extended vertical end-line planes. His statement that, by following a *bend* in the vein, the locator might oust all his neighbors, probably referred to following the vein in its course beyond the end-lines. This suggestion is quite plausible, when we consider one of the contentions of the Richmond company,—viz., that they had a right to follow the vein from the Tip Top incline downward and onward across the Richmond end-line produced (W-X-C, on figure 54), and underneath the surface of the Arctic and Atlantic to the length claimed, regardless of their surface boundaries.

The suggestion is rendered more plausible by a consideration of a further contention of the Richmond company as to the character of the vein in dispute,—i. e., that it was a pipe-vein [62] lying in the ground as we might conceive a gas or water main to lie, inclined and bending, but taking a general easterly course underground. By a *bend in the vein* Judge Field certainly had reference to the longitudinal *course* of the vein, and not its *dip*.

The deduction that Judge Field intended to announce the doctrine that under the act of 1866 the lode locator had a right to all of the vein within the vertical diverging end-line planes, would be all but conclusive but for the following paragraph:—

> Lines drawn vertically down through the ledge or lode at right angles with a line representing this general course at the ends of the claimant's line of location will carve out, so to speak, a section of the ledge or lode within which he is permitted to work and out of which he cannot pass.

Certainly the Eureka case, as adjudicated by both trial and appellate courts, is authority for the doctrine that under the act of 1866 a patentee or locator with diverging end-line planes is not denied all extralateral right, but that at least the locator or patentee is entitled to that segment of the vein underneath the surface which is found (1) within the extended vertical diverging end-line planes, and (2) within rectangular end-line planes applied to the extremities of linear length on the vein within the location. And this effect,

[62] See Prof. Blake's Monograph, "Ore Deposits of Eureka District," vol. vi, Trans. Am. Inst., M. E., 554, 560; Dr. Raymond's Monograph, "Eureka-Richmond Case," Id. 371, 378, and "What is a Pipe-vein?" Id. 393.

as we shall see, has been given to the decision by the supreme court of California.

§ 577. **The Argonaut-Kennedy case.**—The facts involved in the Argonaut-Kennedy case, decided by the supreme court of California, may be best outlined with the aid of a diagram (figure 55).

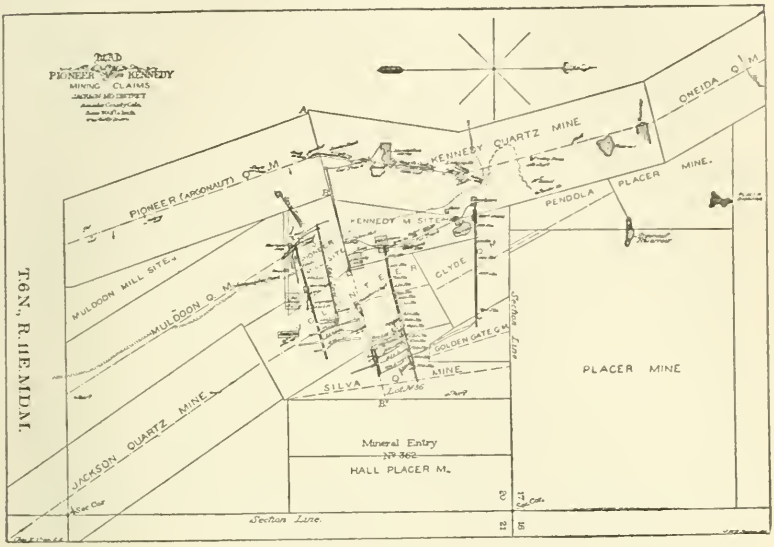


FIGURE 55.

The Argonaut company owned the Pioneer, or Argonaut, claim, located prior to the passage of the act of 1872, and had entered it for patent and received a certificate of purchase prior to May 10, 1872, but the patent was not issued until after the passage of the act. The end-lines diverged in the direction of the dip. The ore bodies in dispute were upon the dip of the vein within the Pioneer end-line planes extended,—that is, south of the north Pioneer end-line A-B-B′ and underneath the surface of the Silva quartz mine, which was owned by the Kennedy company. The Silva was

located twenty years after the entry of the Pioneer. The ore bodies in dispute were reached by the Kennedy company through drifts on the vein run from the side of their working shaft having its collar within the Kennedy millsite. The Kennedy company also owned the Kennedy quartz mine, located on the same vein adjoining the Pioneer on the north, but asserted no right to the ore bodies in dispute by reason of such ownership. All the underground works of the Kennedy company were within the extralateral-right lines of the Kennedy quartz mine, except that some of the levels were extended south of the prolonged common boundary between the Pioneer and Kennedy properties, and this extension, together with the extraction of ore south of that boundary was the trespass complained of.

The Kennedy company defended upon the following grounds:—

(1) The end-lines of the Pioneer are not parallel—consequently it is not entitled to extralateral rights; the ore bodies in dispute, being underneath the surface of the Silva, belong to that claim by virtue of its common-law right;

(2) That if it be held that the rights upon the Pioneer vein are referable solely to the act of 1866, that act, by implication, required that end-lines should be parallel, as a condition precedent to the exercise of the extralateral right;

(3) That even if under the act of 1866 parallelism of end-lines was not required, the owners of the Pioneer, having accepted a patent issued after the passage of the act of 1872, it is bound by the requirement of parallelism of end-lines embodied in that law. As the end-lines are not parallel, there is no extralateral right, and

the ore bodies in dispute fall to the Silva by common-law right;

(4) That if, notwithstanding the nonparallelism of the Pioneer end-lines, the extralateral right is not wholly denied, such right should be defined by applying a plane parallel to the south end-line, and the northern extremity of the vein within the Pioneer location, on the theory that the description contained in the patent commenced at the south end of the claim.

The contention of the Argonaut Mining Company was as follows:—

(1) The title of the Argonaut company to the Pioneer, or Argonaut, mine originated, ripened, and became vested in its predecessors under the act of July 26, 1866. This act did not, either in terms or inferentially, require end-lines to be parallel, and no consequence is attached to a deviation from parallelism;

(2) Although the end-lines were not required to be parallel under the act of 1866, yet if by any process of reasoning any limitation upon the extralateral right was imposed upon the locator's title, by reason of the divergence of the end-lines, such limitation was removed by the act of May 10, 1872, which granted to owners of locations theretofore made the right to pursue the vein on its downward course between the end-line planes of such location as it then existed;

(3) The title evidenced by the certificate of purchase issued prior to the passage of the act of 1872 was the complete equitable title, equivalent for all practical purposes to the issuance of a patent. Congress could not deprive the purchaser of any rights acquired under that certificate nor cast upon such purchaser any additional burdens. It is quite manifest, however, that congress never intended that the estate of any mining

locator held prior to May 10, 1872, should suffer any diminution or curtailment by reason of the act passed on that day;

(4) The patent of the United States issued to the predecessor in title of the Argonaut company in terms grants the vein throughout its entire depth between the end-lines described in the patent and these lines extended in their own direction. The land department had jurisdiction of the subject matter. If more was given than the patentee should have had, it is a question between the government and the patentee; outsiders cannot collaterally assail the patent;

(5) The courts cannot construct end-lines. The end-lines described in a patent issued by the executive cannot be readjusted by the judiciary. The extralateral rights of the Pioneer must be determined by the calls of the patent in connection with the law under which the right to it became perfected, and the physical facts as to the course of the vein through the ground;

(6) If this be not true, the only method for adjusting inequalities for which any judicial precedent can be found is announced in the Eureka case,—i. e., lines drawn at right angles to the course of the vein, at the extreme points on the vein within the location. The application of this theory will give all the ore bodies in dispute (and more) to the Argonaut company;

(7) The agreed statement of facts disclosed that at the time the predecessor in title of the Kennedy Mining Company applied for patent a controversy arose between the owners of the Pioneer and Kennedy as to the true position of the boundary between them, the line A-B on figure 56, *post*.

The Pioneer owner initiated an adverse proceeding. Thereafter a compromise agreement between the two

companies was entered into and the line fixed as it was ultimately described in the patents. This agreement was filed in the land office in the patent proceeding. The Argonaut company contended that the Kennedy company was estopped from denying the right of the Argonaut company to the underground segment of the veins lying south of the agreed extended end-line boundary—A-B-B′ (on figure 56).

The case was tried before Judge G. W. Nicol, superior judge of Tuolumne county, upon an agreed statement of facts. He rendered judgment in favor of the Argonaut company, declining, however, to consider the compromise agreement as material or as possessing evidentiary value. An appeal was perfected to the supreme court of California, which court affirmed the judgment.

The opinion of the appellate court may be epitomized as follows:—

(1) The Argonaut company was entitled to all the rights on the vein which would attach to a location in that form under the act of 1866. The act of 1872 did not deprive that company of anything theretofore acquired. On the contrary, such rights were specifically confirmed;

(2) Under the act of 1866 end-lines of a surface location were not required to be parallel. Locations with diverging end-lines were not denied all extralateral rights;

(3) The intent of the act of 1866 was, that the locator of a vein should have the same length on the lode underneath the surface as he had on the surface. As diverging end-lines, if they were to be taken as defining the extralateral right, would give to the locator more in length underground than the locator had at

the surface, the contention that he was entitled to those underground parts of the vein between the diverging end-line planes cannot be sustained;

(4) The act of 1872, purporting to convey to the owners of claims located prior to the passage of the act veins throughout their entire depth within the end-line planes of the location, cannot be construed as a grant of an extralateral right between diverging end-line planes. The act in this regard was not intended to enlarge the rights upon the original vein, as such rights existed at the date of the passage of the act;

(5) The rights of the Argonaut company to the vein is limited to planes at the limit of their right to the lode on the surface at right angles to the general course of the lode. The doctrine of the Eureka case in this behalf was approved and followed;[63]

(6) The court overruled the contention of the Kennedy company to the effect that parallelism should be obtained by drawing a line at the northern extremity of the lode within the Pioneer location, parallel to the south end-line.[64]

The contention of the Argonaut company as to estoppel was entirely ignored.

The effect of this decision is illustrated on figure 56. It will be observed that the line 1-2 indicates the rectangular plane parallel to 3-4, the end-line A-B-B′ crossing the lode at less than a right angle. As we do not conceive it possible that the Argonaut company could in any event go beyond its north end-line plane, as it was an agreed boundary, the result of the decision is to award an underground segment of the vein between

[63] This principle was recognized in a subsequent case. Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 976.

[64] Argonaut M. Co. v. Kennedy M. & M. Co., 131 Cal. 15, 82 Am. St. Rep. 317, 63 Pac. 148, 21 Morr. Min. Rep. 163.

end-lines slightly converging in the direction of the dip.

The case was taken to the supreme court of the United States on writ of error, and that tribunal determined the case solely on the question of the estoppel claimed by the Argonaut company, not even discussing any of the questions upon which the state court based its opinions.[65] But in a later case it cited the decision of the supreme court of California in the Argonaut-Kennedy case as authority for awarding an extralateral right upon locations with nonparallel end-lines located under the act of 1866.[66]

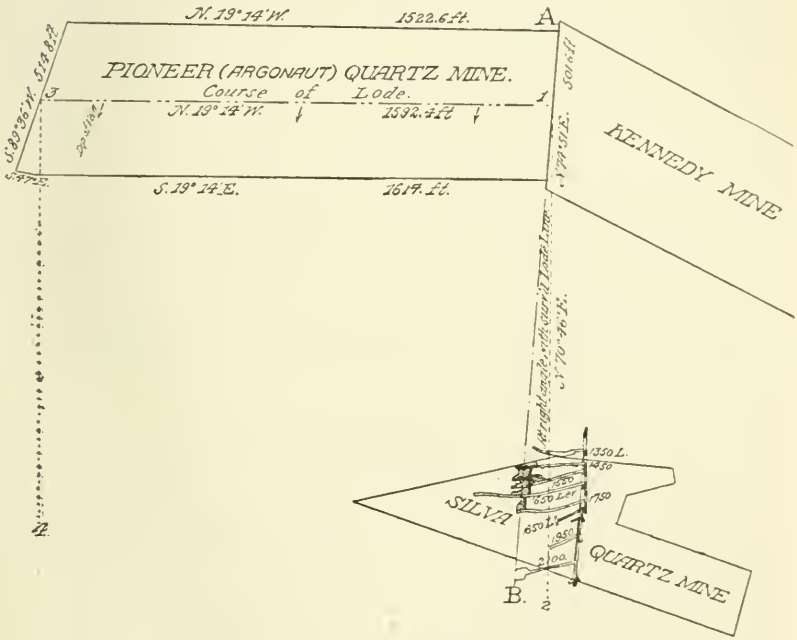


FIGURE 56.

[65] Kennedy M. & M. Co. v. Argonaut M. Co., 189 U. S. 1, 23 Sup. Ct. Rep. 501, 47 L. ed. 685.

[66] East Central Eureka M. Co. v. Central Eureka M. Co., 204 U. S. 266, 269, 27 Sup. Ct. Rep. 258, 51 L. ed. 476.

These two cases, the Eureka and Argonaut, are undoubted authority for the principle that the owner of a claim located under the act of 1866, with diverging end-lines, is entitled to all that part of the vein between the extended vertical end-line planes which also lies between vertical planes established at the extremities of the linear distance on the vein measured at the surface at right angles to the general course of the vein at the surface within the location.

No other solution of the problem has thus far been suggested by the courts.

§ 577a. Application of rectangular planes in cases of converging end-lines of locations under the act of 1866.—Mr. Morrison, in the thirteenth edition of his "Mining Rights," makes the suggestion that if the diverging end-line case of Argonaut M. Co. v. Kennedy M. & M. Co., discussed in a previous section, was correctly decided, there is no reason for drawing a distinction between end-lines converging and those diverging, and that the application of end-line planes at right angles to the course of the vein is just as logical in the case of converging as it is in cases of diverging end-lines.[67]

Mr. Costigan, in his treatise on Mining Law,[68] coincides with Mr. Morrison's suggestion.

With regard to converging end-line cases discussed in a previous section,[69] we have noted that no claim was made in any of them for any part of the vein outside of the converging planes. In some of the cases, the rectangular theory, if asserted, would have probably been resisted by coterminous mine owners, the form of whose claims had been adjusted to the surface

67 Morr. Min. Rights, 13th ed., 173; 14th ed., 198.

68 Page 416.

69 § 574.

lines of the older locations, thus raising other issues and necessitating bringing in other parties, which would have complicated the cases. All the substantial relief which the situation in the respective cases required was obtained through the legal recognition of converging planes. The element of estoppel, as in the Argonaut-Kennedy case, might exist which would prevent the application of the rectangular plane theory, and it would be unsafe to lay down any general rule in advance of judicial expression.

Article III. Extralateral Rights Flowing from Locations Made Under the Act of May 10, 1872, and the Revised Statutes.

§ 581. Introductory.
§ 582. Parallelism of end-lines a condition precedent to the exercise of the extralateral right.
§ 583. "Broad lodes"—Apex bisected by side-line common to two locations.
§ 584. Vein entering and departing through the same side-line.
§ 585. The extralateral right applied to the ideal lode.
§ 586. Vein crossing two parallel side-lines — The Flagstaff case.
§ 587. Same — The Argentine-Terrible case.
§ 588. Same — The King-Amy case.
§ 589. Deductions from side-end-line cases—Extralateral right in such cases defined by vertical planes drawn through the side-end lines produced.
§ 590. Vein crossing two opposite nonparallel side-lines.
§ 591. Vein crossing one end-line and a side-line.
§ 591a. Vein crossing one end-line, passing out of a side-line, then returning, and ultimately passing out of either the other side or end line.
§ 592. Vein with apex wholly within the location, but crossing none of its boundaries, or entering at one end-line and not reaching any other boundary.
§ 593. Extralateral right as to veins other than the one

upon which the location is based.
§ 594. Other illustrations of the application of the principles discussed.
§ 595. Extralateral rights on other lodes conferred by the act of 1872 on owners of claims previously located where the end-lines are not parallel.
§ 596. Extralateral right where the apex is found in surface conflict between junior and senior lode locations—Practical application of the Del Monte case.
§ 597. Extralateral right where the apex is found in surface conflict between junior lode locators and prior placer or agricultural patents.
§ 598. Conclusions.

§ 581. Introductory.—We are now to consider the subject of the extralateral right flowing from locations initiated subsequent to the passage of the act of May 10, 1872, and to note the conditions and limitations under which it may be exercised. No branch of the mining law presents so many intricate and varied questions, and there are none more difficult to treat comprehensively and concisely. Certain important principles governing it have been established, and are beyond the domain of speculation. Others await the decision of the supreme court of the United States, the final arbiter upon all questions arising under the federal laws.

Manifestly, the application of the law to individual cases requires the consideration of physical conditions existing in each. Where a patented surface area is invaded, the patentee need but produce the instrument under which he deraigns title from the paramount proprietor to put the invader upon proof of justification; but where, in pursuit of his vein on its downward course, out of and beyond vertical planes drawn downward through his surface boundaries, his right is challenged, he is called upon to show something more than appears upon the face of the patent, and establish facts,

the existence of which are not even, *prima facie*, presumed from that instrument.

Naturally, therefore, the discussion leads us into geological questions, sometimes simple, other times complex. The peculiar facts found in one case may never have their precise parallel in another. For that reason, each case presented must be analyzed in the light of the facts established, or as they appeared to the court deciding it. We may have to reach the ultimate goal by circuitous routes and easy stages.

The spirit in which the statutes upon this subject should be approached is aptly stated by the supreme court of the United States, speaking through Justice Brewer, as follows:—

> It must be borne in mind in considering the questions presented that we are dealing simply with statutory rights. There is no showing of any local customs or rules affecting the rights defined in and prescribed by the statute, and beyond the terms of the statute courts may not go. They have no power of legislation. They cannot assume the existence of any natural equity and rule that by reason of such equity a party may follow a vein into the territory of his neighbor and appropriate it to his own use. If cases arise for which congress has made no provision, the courts cannot supply the defect. Congress having prescribed the conditions upon which extralateral rights may be acquired, a party must bring himself within those conditions, or else be content with simply the mineral beneath the surface of his territory. It is undoubtedly true that the primary thought of the statute is the disposal of the mines and minerals, and in the interpretation of the statute this primary purpose must be recognized and given effect. Hence, whenever a party has acquired the title to ground within whose surface area is the apex of a vein, with a few or many feet along its course or strike, a right to follow that vein on its dip for

the same length ought to be awarded to him if it can be done, and only if it can be done, under any fair and natural construction of the language of the statute. If the surface of the ground was everywhere level, and veins constantly pursued a straight line, there would be little difficulty in legislation to provide for all contingencies; but mineral is apt to be found in mountainous regions where great irregularity of surface exists and the course or strike of the veins is as irregular as the surface, so that many cases may arise in which statutory provisions will fail to secure to a discoverer of a vein such an amount thereof as equitably it would seem he ought to receive.[70]

§ 582. Parallelism of end-lines a condition precedent to the exercise of the extralateral right.—It is needless to quote the language of sections twenty-three hundred and twenty and twenty-three hundred and twenty-two of the Revised Statutes. The former prescribes the nature and extent of the location, and the latter defines the extent of the extralateral right. The law does not in terms impose as the penalty for failure to parallel the end-lines, the deprivation of all extralateral right, but the courts construing the two sections together have announced the conclusion that such parallelism is essential to the exercise of the right.[71] When we speak of end-lines, we mean such lines as are crossed by the lode on its course. As we have heretofore noted, side-lines may become end-lines, or, as we have called them for descriptive purposes, side-end lines.[72]

[70] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 66, 67, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[71] Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 976.

[72] *Ante*, § 367.

The leading case upon the subject of nonparallelism, and the consequences flowing from it, is that of the Iron Silver Mining Company v. Elgin Mining and Smelting Company, decided by the supreme court of the United States,[73] familiarly known as the "Horseshoe case," the illustration of which is photographed upon the brain of every mining practitioner.

The doctrine there announced by a majority of the court is as follows:—

> Under the act of 1866, parallelism in the end-lines of a surface location was not required, but where a location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side-lines. His lateral right by the statute is confined to such portion of the vein as lies between such planes drawn through the end-lines and extended in their own direction; that is, between parallel vertical planes. It can embrace no other.

We reproduce the diagram (figure 57) for illustrative purposes.

The case arose, as did all others in which the Iron Silver Mining Company was involved, out of conflicting rights to certain portions of the blanket deposits of Leadville. Dr. Raymond discusses the case fully in his monograph, "Lode Locations."[74]

It appears that the line marked "apex" on figure 57 represents a vein exposure caused by the erosion of California Gulch, the only exposure found in that neighborhood. The vein on its downward course had

[73] 118 U. S. 196, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98, 15 Morr. Min. Rep. 641; cited in Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 67, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[74] Trans. Am. Inst. M. E., vol. xv, p. 272.

a slight inclination from the horizontal in the direction of the Gilt Edge. The form assumed by the line of vein exposure may be illustrated in a homely way by a bite taken out of a horizontally-held sandwich.[75]

In another portion of this treatise,[76] we have presented geological cross-sections illustrating the position in the earth of this form of deposit, showing the

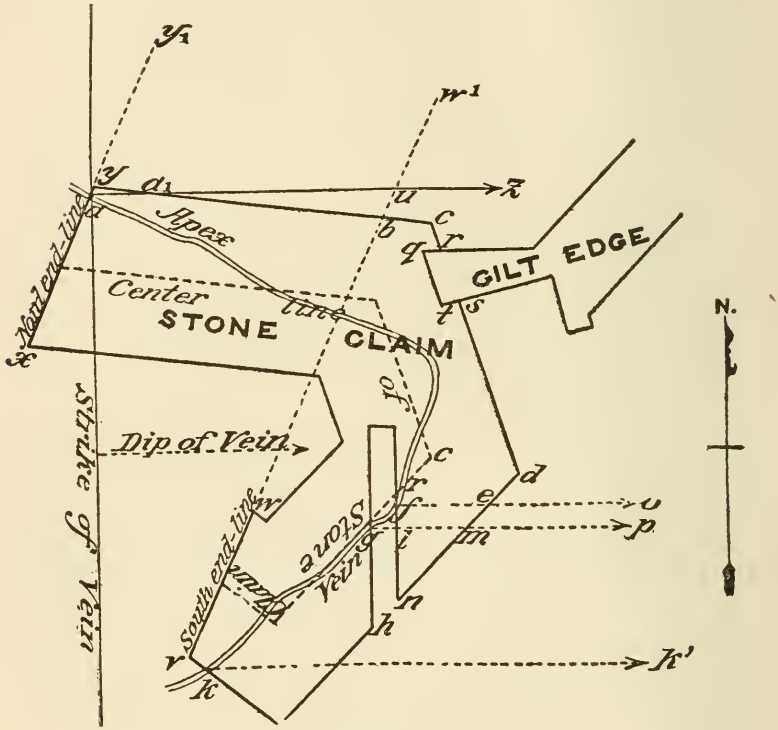


FIGURE 57.

difficulties of determining which is the strike and which is the dip of the vein. Assuming the vein exposure to be an apex, the predecessor in title of the Iron Silver Mining Company laid his location along

[75] We are indebted to Dr. Raymond for this comparison.

[76] Figures 20a and 21b, p. 702.

what he supposed to be the course of the vein, producing the fantastic results shown in the figure, being unable to draw a line at the southwestern terminus of the so-called apex, which would be across the apex and at the same time be parallel to the northwest end-line, *x-y*. The so-called apex crossed the line *v-i*, which was not parallel to *x-y*, the two lines diverging at an obtuse angle in the direction of what was determined to be the dip of the vein. Therefore, the right to pursue the vein underneath the Gilt Edge claim was denied. A strenuous plea was made in the case for the judicial readjustment of the boundaries, so as to give to the Iron Silver Mining Company a segment of the vein in depth, but the majority of the court held, as we have heretofore observed, that it had no power to make locations, but that the miner must stand or fall upon the one he makes himself.[77] Chief Justice Waite, with whom concurred Mr. Justice Bradley, dissented[78] from the views of the majority of the court, favoring the application of rectangular end-line planes to the extremities of the vein within the surface location,[79] the rule applied in the Eureka and Argonaut cases to locations made under the act of 1866.[80]

While the local conditions out of which this case arose were peculiar, there is no reasonable expectation that the doctrine of the case, as hereinbefore quoted, will be disturbed where the lines crossing the lode diverge in the direction of the dip.

[77] Principle referred to in Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 974.

[78] This dissent is commented on in East Central Eureka M. Co. v. Central Eureka M. Co., 204 U. S. 266, 269, 27 Sup. Ct. Rep. 258, 51 L. ed. 476, and in Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 974.

[79] 118 U. S. 196, 209, 6 Sup. Ct. Rep. 1177, 30 L. ed. 103, 15 Morr. Min. Rep. 641.

[80] *Ante*, §§ 576, 577.

It has been applied by Judge Knowles to a location having the form of a triangle,[81] and will probably control all forms of locations, varying from a square to a crescent, where the production of the end-lines would create exaggerated inequalities in length as the vein is followed in depth.

Where, however, the two lines crossing the lode converge in the direction of the dip, intersecting, as they are produced, at some point beyond the side-lines, we cannot see upon what principle the doctrine can be maintained. Where the reason of the rule ceases, the rule itself should cease. To say to a claimant with converging end-lines, "The law permits you to take as much of the vein in its downward course, beyond the side-lines, as you may include within parallel surface end-lines. You have taken less than you might have acquired; therefore, you shall have nothing," is illogical.

What we have heretofore said upon this subject of converging end-lines under the act of 1866[82] applies with equal force to locations made under the later laws.[83]

In several decisions the supreme court of California has questioned the doctrine that a locator under the act of 1872, the end-lines of whose locations converge in the direction of the dip, is entitled to the extralateral right between the converging planes.

In Central Eureka M. Co. v. East Central Eureka M. Co.[84] the court expressed the opinion *arguendo* that the

81 Montana Co., Ltd., v. Clark, 42 Fed. 626, 628, 16 Morr. Min. Rep. 80.

82 *Ante*, § 574.

83 This doctrine was conceded by counsel as to the extralateral rights on the Emma claim involved in the case of Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 109 Fed. 538, 540, 48 C. C. A. 665, 21 Morr. Min. Rep. 317.

84 146 Cal. 147, 79 Pac. 834, 835, 9 L. R. A., N. S., 940.

decisions in Iron S. M. Co. v. Elgin M. & S. Co.,[85] Del Monte M. & M. Co. v. Last Chance M. & M. Co.,[86] and Argonaut M. Co. v. Kennedy M. & M. Co.[87] inclined to the conclusion that extralateral rights are granted under the act of 1872 only when the end-lines are parallel, and that this, inferentially at least, negatived any extralateral right where the end-lines converged in the direction of the dip. The court, however, held that it was unnecessary to decide the question in the case before it.

In the case of Daggett v. Yreka M. Co.[88] the court said that the locators acquire no extralateral rights to the dip of the vein unless the end-lines are parallel. The question here discussed was not involved in that case. In the later case of McElligott v. Krogh[89] the trial court found that the end-lines were substantially parallel, as appeared from a map filed in the cause. The map showed converging end-lines. The findings being thus contradictory, the supreme court was not able to pass upon the "interesting question" as to whether there would be extralateral rights on a claim with converging end-lines.

The Central Eureka case reached the supreme court of the United States, which affirmed the judgment without alluding to the question here discussed. The Argonaut-Kennedy case was affirmed by the supreme court of the United States[90] without reference to the extralateral right problems involved in the case.

85 118 U. S. 197, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98.

86 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

87 131 Cal. 15, 25, 82 Am. St. Rep. 317, 63 Pac. 148, 21 Morr. Min. Rep. 163.

88 149 Cal. 357, 86 Pac. 968, 974.

89 151 Cal. 126, 90 Pac. 823, 827.

90 189 U. S. 1, 23 Sup. Ct. Rep. 501, 47 L. ed. 685.

The question, therefore, as to whether any extralateral right is to be awarded in cases of converging end-lines on locations made under the act of 1872 is *res integra*, so far as the courts are concerned.

The author is not disposed to recede from his position heretofore taken that the reason of the rule sanctions the exercise of an extralateral right when end-lines are converging and denies such right when they are diverging.

With this qualification there can be no question as to the scope and meaning of the rule announced in the Elgin case.

We have heretofore noted[91] that the supreme court of California, following the *dictum* of Judge Field in the Eureka case, has stated that the provisions of the act of 1872, requiring the end-lines of each claim to be parallel, is merely directory, and no consequence is attached to a deviation from its direction.[92]

In the case wherein this was announced the controversy was over the possession of the surface. It involved only intralimital rights, and, as fully explained in preceding sections,[93] this class of rights is not affected by the form of the location, so long as the area included is within the statutory limit.

At all events, the *dictum* of Judge Field and the decision of the supreme court of California, at least in so far as it applies to the extralateral rights, were overruled by the Horseshoe case.[94]

The requirement of the statute as to parallelism does not necessarily imply that the lines should be drawn

[91] *Ante*, § 365.

[92] Horswell v. Ruiz, 67 Cal. 111, 7 Pac. 197, 15 Morr. Min. Rep. 488.

[93] *Ante*, §§ 365, 552.

[94] So held in Argonaut M. Co. v. Kennedy M. & M. Co., 131 Cal. 15, 23, 82 Am. St. Rep. 317, 63 Pac. 148, 151, 21 Morr. Min. Rep. 163.

on the surface with absolute mathematical precision. A reasonable compliance with the law is all that is required. A *substantial* parallelism should satisfy the law.

The statute[95] in defining the extent of the extralateral right refers to *locations* only, and does not in terms mention patents; but, of course, a patent is but the evidence of a perfected location. A right conferred by patent cannot be defeated by showing a want of parallelism of the end-lines of the claim as originally located. The location will be conclusively presumed to have been made in the form described in the patent.[96]

Conversely, if the form of the surface boundaries, as described in that instrument, taken in connection with the physical facts shown, is of such a character as to prevent the exercise of the extralateral right, the patentee cannot be permitted to appeal to his location as originally marked to control, vary or modify the terms of the patent.

The term "location," therefore, as found in this section of the statutes, is intended to apply to the *status* of the location as to form as it appears at the time rights asserted under it are brought into question. The production of the patent simply dispenses with the necessity of proving the antecedent facts culminating in its issuance—facts that, in the absence of such an instrument, would have to be proved independently, such as discovery, marking of the boundaries, and performance of such other acts as may be required under local or state regulations as conditions precedent to the completion of a valid location.

[95] Rev. Stats., § 2322; 17 Stats. 91.

[96] Doe v. Waterloo M. Co., 54 Fed. 935, 940; S. C., on appeal, 82 Fed. 45, 51, 27 C. C. A. 50, 19 Morr. Min. Rep. 1; Golden Reward M. Co. v. Buxton M. Co., 79 Fed. 868, 874; *post*, § 778.

The term "survey" is sometimes found in the decisions when referring to the exterior form of a location. This refers, of course, to the patent survey, the field-notes of which are embodied in the patent as ultimately issued.

It may not be out of place to call attention to the fact that in the absence of a patent, the extent of the extralateral right is not necessarily to be determined by the lines of the location as they were originally established in the field. If a locator has any apprehension as to the sufficiency of his original location, there is no reason why he should not be permitted to modify or amend it, if it can be accomplished without prejudice to the rights of others.[97] For the purpose of obtaining parallelism, the lines may be at least drawn in, so that, as finally surveyed for patent, the location will be perfected in strict compliance with the law.[98] We have fully discussed the circumstances justifying a change of boundaries in a preceding article,[99] and the manner in which such changes may be effected.

§ 583. "Broad lodes"—Apex bisected by side-line common to two locations.—It sometimes happens, owing to the limited surface exposure presented to the observation of the prospector and the lack of time or opportunity for development prior to the completion of the location, he is unable to determine the width of the vein or lode, and so places the lines of his location as to include only a part of the width of the apex, presenting the case of an apex bisected by a side-line.

97 *Ante*, § 397.

98 Doe v. Sanger, 83 Cal. 203, 214, 23 Pac. 365, 368; Doe v. Waterloo M. Co., 54 Fed. 935, 940; Tyler v. Sweeney, 54 Fed. 284, 292, 4 C. C. A. 329; Last Chance M. Co. v. Tyler, 61 Fed. 557, 560, 9 C. C. A. 613; Philadelphia M. Claim v. Pride of the West, 3 Copp's L. O. 82.

99 §§ 396–398.

A subsequent prospector locates a claim adjoining, adopting the bisecting side-line of the senior locator as a common boundary, and including a part of the apex omitted from the prior location. It also may happen, owing to the liberal definitions applied by the courts to the terms "vein" or "lode,"[100] the apex surface may be wider than the maximum lateral limits of a claim allowed under the law. Cases of this character are not likely to occur, except in those localities where local legislation permits only narrow surfaces,—e. g., Colorado and North Dakota. We may illustrate not only possible but actual occurrences which have come before the courts for adjudication by the use of figures 58 and 59. In figure 58, the junior locator, B, has not only adopted the side-line of the senior location, but has made his end-lines practically the extension of those of the prior locator, making the end-line planes of the two locations coincident. In figure 59, the junior locator has given his end-lines a different direction from those of the senior. What, if any, are the extralateral rights attaching to the two locations in the instances illustrated?

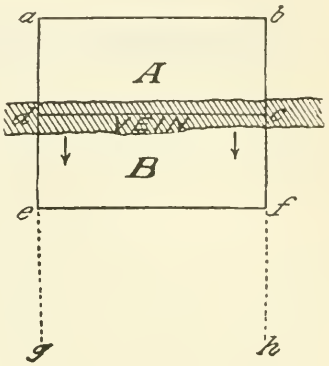


FIGURE 58.

It has been said that if any portion of the apex is included within the lines of a location, such a location is valid,[1] at least as to all intralimital rights. But the extent of the extralateral right may depend upon the

[100] *Ante*, §§ 291, 296.

[1] *Ante*, § 364.

physical conditions,—e. g., the extent of the apex within the claim.

Another consideration is self-evident. The extent of the rights of the junior locator who appropriates that portion of the apex excluded from the senior location depends to a great degree on the nature and extent of the right flowing from the senior appropriation.

The decisions of the courts, so far as they deal with the question under present consideration, have not

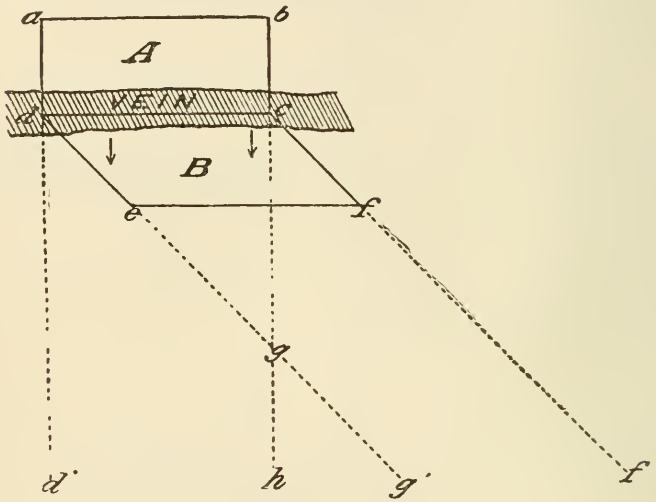


FIGURE 59.

been harmonious, and until the supreme court of the United States finally determined it, there was a pronounced divergence of opinion. As the principle ultimately announced has been the result of what may be called a judicial evolution, it is expedient to review the cases.

Judge Hallett entertained the view that in order to be entitled to the extralateral right, a locator must include within his surface boundaries the entire width

of the apex. This ruling was made in the case of Hall v. Equator Mining Company, to which we have heretofore alluded, presenting a diagram of the property in controversy,[2] and noted that on the trial of the case upon its merits, it presented an instance of one lode with part of its width in one location and part in the other.

In addition to the decision of Judge Hallett upon the motion for a preliminary injunction, which suggested but did not deal with the aspect of the case now under consideration, the case was tried three times—the first time before that judge, whose decision is not found in any of the reports.

Carpenter's "Mining Code"[3] contains some excerpts from it, and Dr. Raymond gives us full quotations in his "Law of the Apex," from which we quote so much as will illustrate Judge Hallett's views:—

> As to all the disputed ground, the principal question affecting the whole lode is, whether by locating a part of the width of outcrop the whole may be taken. Of several collateral locations on the course of a lode, where the top or outcrop is of sufficient breadth to admit of more than one, are not all of equal dignity? This question will admit of but one answer, with such modifications as may be hereafter suggested. The act of 1872 certainly requires a location to be along the course of the vein and to include the top of it, and it is believed that the act of 1866 is of the same effect. Defendants' location was made under the act of 1866, and probably some discussion of that view of the act would be appropriate in this connection. But it may be enough to say that defendants assumed to take the whole lode into

[2] Fig. 44, § 558.

[3] 3d ed., p. 65.

their location, and if they failed to get the whole, either by their own omission or because of some restrictive provision of the local law, the result is the same. In either case they cannot now claim more than was taken by the location. The same rule is applicable to plaintiff's location, and as to both of them it is no answer to say that the law would not admit a location of sufficient width to take the whole lode. If the law is illiberal, it is not for that reason the less controlling. If, however, a right to the entire lode cannot be asserted under a location covering a part only of its width, as seems to be obvious, the location may be valid for the part described in it. If it is on the top of the lode, it is within the act, and so it ought to be good for the part within the lines extended downward vertically, if for no more. . . . . And thus it may be true that each of several locators on the same vein or lode will own all within his lines without being able to go beyond them. For, as to his right to go into other territory, he can only do so in pursuit of a lode or vein that has its top or apex wholly in his own ground, and having but a part of the lode in his territory he cannot comply with that condition. This appears to be a clear inference from the language of the act. The right given relates to veins, lodes, and ledges the tops of which are inside the surface lines, which obviously means the whole, and not a part. If, then, two or more collateral locations be made on one and the same vein, and the vein appear to be homogeneous throughout its width, we are authorized to say that each shall be confined within his own lines drawn down vertically. . . . .

This ruling deprives both A and B under both sets of locations shown on figures 58 and 59 of all extralateral rights, and limits each to the vertical boundaries of their respective locations.

Dr. Raymond illustrates the effect of this rule by a simple geological cross-section, as shown in figure 60, drawn through the end-lines, *1-2* and *2-3*. Dropping a vertical plane through the common side-line, *2-5*, leaves but a small triangular segment of the vein to A, and a similar plant drawn through the side-line, *3-4*, shows the extent of B's rights between the two planes.

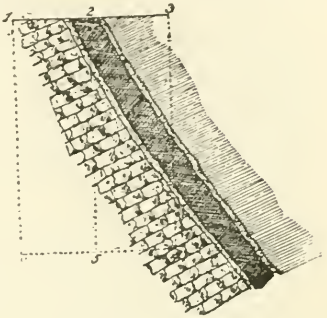


FIGURE 60.

At the next trial of the case Justice Miller charged the jury as follows:—

> There is introduced, both by plaintiffs and defendants, evidence tending to prove that the claims of both parties are located on the same vein or lode of mineral-bearing rock in place, the general apex or upper surface of which is about one hundred feet wide.[4] If the jury believe this to be true, then I instruct you, as the law of this case, that plaintiffs, having the prior title from the United States to that portion of this lode within the lines of their patent, extended vertically downward to the earth's center, and the defendants having contested plaintiffs' right to receive a patent for the parts of the lode in controversy, in the court of the territory, according to the act of congress on that subject, and failed in that contest, and having accepted and read in evidence a patent for their own claim, which expressly excepts out of its granting clause the interfering parts in plaintiffs' said patent, the law of the case is for the plaintiffs, and they are entitled to all the mineral found within the side-lines of their patent, extended downward vertically.[5]

[4] The claims were each fifty feet wide.

[5] See note, 11 Fed. Cas. No. 5931, p. 225.

When we consider that the defendants' location of the Equator was prior in point of time to the plaintiffs' Grand Central, if the defendants could lawfully base an extralateral right upon the part of the apex within the Equator, they could not be deprived of it by the government patenting to another the surface overlying the dip. Asserted underground rights are not the subject of adverse claims.[6] Such controversies are confined to surface conflicts. Justice Miller's views are in practical accord with Judge Hallett's.

Mr. Morrison, in the earlier edition of his work, approved Judge Hallett's ruling, which, he said, had been followed by the trial courts in Colorado.[7]

The court of appeals of Colorado, in the case of Big Hatchet Consol. M. Co. v. Colvin,[8] said that the right to follow a vein on its dip into territory belonging to another is dependent upon the full ownership of the apex.[9]

A case somewhat similar to the Grand Central Equator controversy came before the supreme court of Utah territory.[10] The facts found by the trial court, which finding was accepted by the appellate tribunal, presented a case where the first locator had the apex of a vein entirely within the surface lines of his claim for a portion of its length, and the remaining portion partly within and partly without, the excluded portion being embraced within the boundaries of a coterminous junior location.

6 Champion M. Co. v. Cons. Wyoming M. Co., 75 Cal. 78, 83, 16 Pac. 513, 514, 16 Morr. Min. Rep. 145.

7 Morr. Min. Rights, 10th ed., p. 136.

8 19 Colo. App. 405, 75 Pac. 605, 606.

9 Messrs. Morrison & De Soto, of counsel in this case, inform the author that on the argument it was practically conceded that in order to claim dip rights, the locator must have the entire apex.

10 Bullion, Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 3, 11 Pac. 515, 15 Morr. Min. Rep. 449.

The majority of the appellate court held that under the act of 1872,—

> The discoverer of any part of the apex gets the right to its entire width, despite the fact that a portion of the width may be outside of the surface sidelines of his claim, extended downward vertically. While he has no right to the extralateral surface, he has a right to the extralateral lode beneath the surface.[11]

Judge Boreman dissented, practically accepting the doctrine of Judge Hallett in the Equator case.

If this be the correct rule in the cases illustrated in figures 58 and 59, A, the prior locator, would have the extralateral right within his extended end-line planes. B, in figure 58, would have certainly no extralateral right in any event, as his end-line planes are coincident with A's. With reference to B's rights under his location shown on figure 59, it would seem that, under the Utah rule, there could be but one extralateral right, and that being awarded to A, there was nothing left for B, although his end-line planes are projected at different angles from those of A.

The case of Rose v. Richmond Mining Company[12] was decided by the supreme court of Nevada upon the assumption that the first locator took the whole lode to its entire width. No issue was raised as to this point. It was conceded by both parties to the litigation. The supreme court of the United States, in its opinion affirming the judgment, gave no consideration whatever to the subject.[13]

Dr. Raymond refers to the rulings by Judges Rising and Rives, district judges in Nevada, as supporting

[11] Id., 11 Pac. 525.

[12] 17 Nev. 25, 27 Pac. 1105, 1110.

[13] Richmond M. Co. v. Rose, 114 U. S. 576, 5 Sup. Ct. Rep. 1055, 29 L. ed. 273.

this theory as to extralateral rights on broad lodes. He undoubtedly had in mind the Rose-Richmond case, heretofore referred to.

Without doubt, in Nevada, prior to the act of 1866, and in fact after that act had been passed, locations were made of the vein without any attempt to draw side-lines. The entire Comstock lode was located in this way, it being popularly conceded that the *locus* of the east wall of that remarkable zone could not be determined.

The circuit court of appeals for the ninth circuit, however, announced a rule which is more liberal than that found in any of the prior cases. It awards extralateral rights to both locators on the bisected vein. Take, for example, the conditions shown on figure 59. A, being prior in time, takes the underground segment lying between his extended end-line planes *a-d-d'* and *b-c-h*. B takes the segment *c-f-f'* and *g-g'*. In other words, B's extralateral right takes effect beyond the plane of conflict between A's end-line planes and those of B,—that is, beyond the plane *c-g*.

This we understand to be the effect of the rule announced by that court in the case of the Empire State-Idaho M. and D. Co. v. Bunker Hill and Sullivan M. and C. Co.[14]

The facts of the case, as then understood and found by the court, are illustrated by a diagram accompanying the opinion, which we herewith reproduce (figure 61).

The Empire State company owned the Viola and San Carlos. The vein was broad, but precisely how broad was not determined.

The trial court found the apex of the vein to be within both claims substantially as indicated on the

[14] 114 Fed. 417, 419, 52 C. C. A. 219, 22 Morr. Min. Rep. 104.

diagram. The vein is of the class represented in cross-section on figure 7, page 651, of this treatise, the foot-wall boundary being a simple fissure wall and the hanging boundary an indefinite limit of mineralization.

The Viola was prior in point of time to the San Carlos. The Bunker Hill company owned the King, a location junior in point of time to both the others, covering the triangular tract lying between the Tyler, Viola, and San Carlos end-lines.

To secure this triangular and theretofore unappropriated tract containing the apex to the extent shown, the locator of the King placed his north, west and south

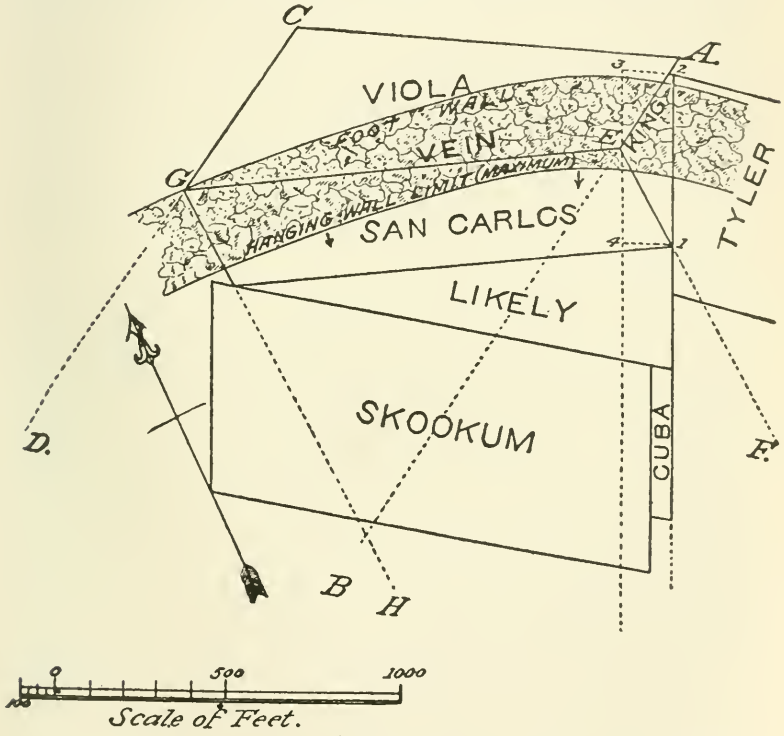


FIGURE 61.

boundaries over and upon the lines of the Viola and San Carlos, claiming the right to do so under the rule

announced in the Del Monte case, discussed in previous sections.[15]

The controversy arose over the ownership of the ore bodies within the extended end-line planes of the King. The Bunker Hill company contended that either both the San Carlos and Viola were denied the extralateral right, and were limited to vertical planes drawn through the surface boundaries (Judge Hallett's doctrine), or the extralateral right pertained to the Viola, whose end-line planes did not conflict with the King (the Utah rule). Judge James H. Beatty, sitting as circuit judge, upheld the latter contention and awarded the Bunker Hill judgment.[16] On appeal this judgment was reversed, the court of appeals determining that both the Viola and San Carlos had extralateral rights, the latter taking effect after passing beyond the plane of conflict with the Viola, represented by the line E-B on the diagram. As the King end-line boundaries conflicted with those of the San Carlos, it was denied the extralateral right.

It would appear, from reading Judge Hallett's opinion in the Del Monte case,[17] that a broad vein with structural conditions similar to those existing in the King-Viola-San Carlos case was involved, the footwall being well defined, and the hanging-wall a matter of serious controversy. Judge Hallett, in the application for an injunction in the case involving the extralateral right of the New York as against the Del Monte claim, thought that this question should be submitted to a jury, and therefore he did not undertake to determine either the fact or the law to be applied. The case involving the extralateral right of the Last Chance as

[15] §§ 363, 363a.

[16] Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 106 Fed. 471, 474.

[17] Del Monte M. & M. Co. v. New York & Last Chance M. Co., 66 Fed. 212.

against the Del Monte was presented to the circuit court of appeals upon an agreement of counsel that the course of the footwall as marked in the diagram found in the record, which accompanies the opinion,[18] should for the purposes of the case be deemed to be the course of the apex.

In the case of St. Louis Mining & M. Co. v. Montana M. Co.,[19] the circuit court of appeals, ninth circuit, had previous to its decision in the King-Viola-San Carlos case held that where the apex of the vein was partly within one location and partly in the other, the extralateral right was with the prior locator, to the extent that any part of the apex was within the prior claim. But the facts of that case were somewhat different from the Viola-San Carlos-King case. In the St. Louis-Montana case, the senior locator held the entire apex of a secondary vein for some distance. On its strike it passed out of a side-line common to two claims. As the court held that the extralateral right to the secondary vein was to be defined by a vertical plane parallel to the plane of the end-line crossed by the original or discovery lode at the point where the secondary vein passed out of the side-line, the question to be determined was where on the side-line was the plane to be established,—where the hanging-wall or the footwall cut the side-line? The court fixed the footwall as the point, this being the place where the senior claim lost its longitudinal right on the vein. It was not strictly a case of "split" vein, although the principle seemed to present analogies which justified its application to the Viola-San Carlos-King case, and the trial court in that case so held.[20]

[18] 171 U. S. 55, 58, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370. See, also, fig. 86, *post*, § 594.

[19] 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725.

[20] Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 106 Fed. 471, 472.

A diagram showing the facts in the St. Louis-Montana case appears in connection with the discussion of the extralateral right as to veins other than the one upon which the location is based.[21]

The rule announced by the circuit court of appeals, ninth circuit, in the Viola-San Carlos case was followed by that court in subsequent cases.[22]

The case of United States Mining Co. v. Lawson [23] involved a controversy over a bisected broad lode apex, which may be illustrated by the accompanying diagram.

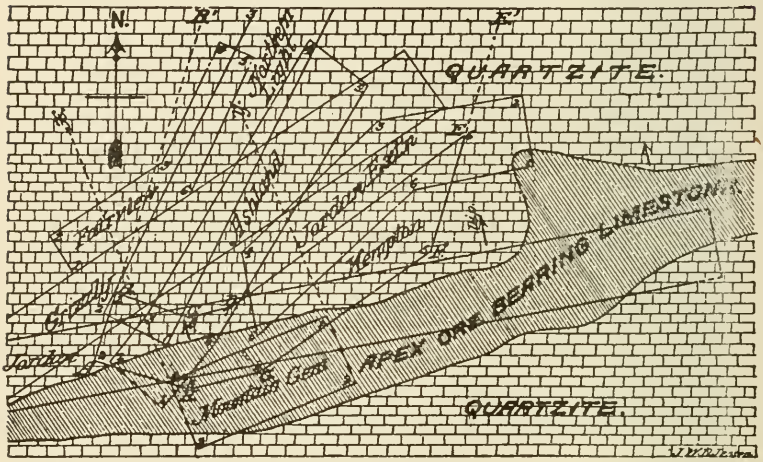


FIGURE 61A.

[21] *Post*, § 594. This case and its subsequent history will be discussed when we reach the subject of extralateral rights on secondary veins, *post*, § 594.

[22] Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 121 Fed. 973, 977, 58 C. C. A. 311, 22 Morr. Min. Rep. 560; Last Chance M. Co. v. Bunker Hill & S. M. & C. Co., 131 Fed. 579, 588, 66 C. C. A. 299; *certiorari* denied, 200 U. S. 617, 26 Sup. Ct. Rep. 754, 50 L. ed. 622; appeal dismissed, 200 U. S. 613, 26 Sup. Ct. Rep. 754, 50 L. ed. 620.

[23] 134 Fed. 769, 67 C. C. A. 587.

The complainants owned the Old Jordan, Mountain Gem, Jordan Extension, Grizzly, Northern Light and Fairview, and the defendants owned the Kempton and Ashland. The apex of the ore-bearing limestone determined by the court to be the vein is longitudinally bisected or divided by the Old Jordan, Mountain Gem and Kempton. Priority of location was found in favor of complainant as to the Old Jordan and Mountain Gem. In awarding the extralateral right to the prior claims, the court held that—

> When two or more mining claims longitudinally bisect or divide the apex of a vein, the senior claim takes the entire width of the vein on its dip, if it is in other respects so located as to give a right to pursue the vein downward outside of the side-lines. This is so because it has been the custom among miners, since before the enactment of the mining laws, to regard and treat the vein as a unit, and indivisible in point of width as respects the right to pursue it extralaterally beneath the surface.[24]

The supreme court of the United States affirmed the judgment of the circuit court of appeals, expressly indorsing the views of the court above quoted.[25] Both courts, in dealing with this case, cite approvingly the decisions of the circuit court of appeals, ninth circuit, heretofore referred to. The case of United States Mining Company v. Lawson did not involve the question of the rights of a junior locator holding a segment of the bisected apex to pursue the vein in depth after passing beyond the place of conflict with the extralateral right of the senior claim. The exigency of the case did not require a discussion of this question.

[24] 134 Fed. 769, 774, 67 C. C. A. 587.

[25] Lawson v. United States Min. Co., 207 U. S. 1, 13, 28 Sup. Ct. Rep. 15, 52 L. ed. 65.

In support of the doctrine of the Viola-San Carlos as to this, however, the rules governing extralateral rights in cases of conflicting or interlocking underground planes discussed in subsequent sections[26] may be plausibly invoked by analogy.

The case of Wall v. United States Mining Company,[26a] tried before Judge Marshall, sitting as circuit judge in the district of Utah, involved a part of the same lode which was the subject of litigation in the case of United States Mining Company v. Lawson. The facts of the case as they were substantially found by the court are illustrated on figure 61B.

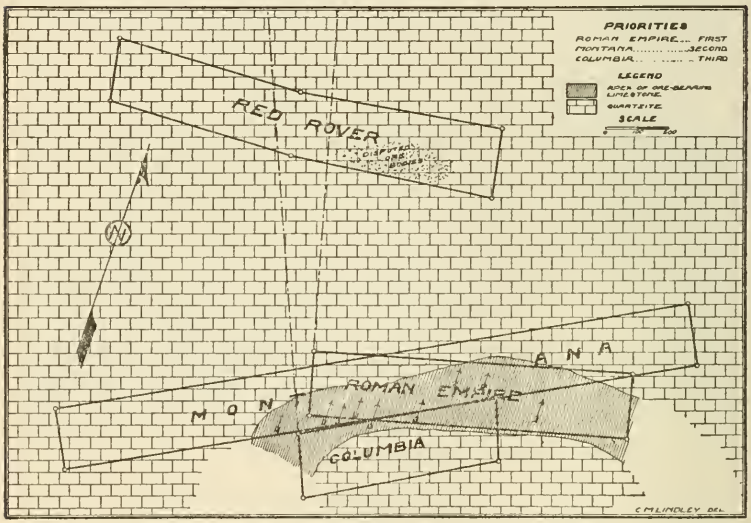


FIGURE 61B.

The plaintiff and his lessor owned the Red Rover and claimed the ownership of the ore bodies in dispute by reason of their ownership of the surface. The de-

[26] §§ 596, 609.

[26a] Unreported.

fendants claimed under the Roman Empire and other claims covering the apex, which was bisected by the boundary lines of that claim and the Montana and Columbia. The Roman Empire held priority, the Montana being second. The extralateral right was awarded to the Roman Empire, the extended end-line planes of which embraced the ore bodies in dispute, the court holding that it was unnecessary to consider whether the defendant takes the entire vein in dispute by virtue of the ownership of the Roman Empire and Montana claims or whether, as to a part, defendants must rely on the apex in the Columbia under the rule established in the Viola-San Carlos case heretofore discussed.[27] The court said that there was no reason to doubt the correctness of the Viola-San Carlos decision.

Where there are two veins within a lode, a condition which frequently arises,[28] each vein may be the subject of an independent appropriation, and the broad-lode question cannot arise. It is only involved where, as suggested by Judge Hallett, the lode is homogeneous throughout its width.

Before leaving the subject of "broad lodes" it may be well to call attention to certain classes of deposits which in their occurrence are "broad," and by reason of being in place may fall within the definition of "lodes," but which at the same time may not be susceptible of being carved up into numerous surface locations upon which extralateral rights may be predicated. We may take, for example, what are familiarly called the "copper porphyries," zones of impregnation, replacement, or secondary enrichment caused by denudation and leaching. These zones cover large areas,

[27] 114 Fed. 417, 52 C. C. A. 219, 22 Morr. Min. Rep. 104.

[28] United States v. Iron S. M. Co., 128 U. S. 673, 680, 9 Sup. Ct. Rep. 195, 32 L. ed. 571; *ante*, § 290.

sometimes a mile or more in length by a width of a thousand or more feet. At times they are surrounded by rocks of a different character. But their boundaries, so far as mineralization is concerned, are, generally speaking, commercial ones, on all sides, top and bottom. Zones of this character have no dip or downward course, in a legal sense. Nor have they an apex, except, perhaps, theoretically, such as the land department for executive purposes establishes in the case of blanket deposits.[29] The mineral-bearing rock is homogeneous throughout, it is true. But to apply the extralateral right doctrine of bisected apex and "broad lodes" to this character of deposits would be an absurdity.

As was said by the supreme court of Utah in the case of Grand Central Min. Co. v. Mammoth M. Co.:[30]—

> What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex, to which attaches the statutory right to invade the possession of and appropriate the property which is presumed to belong to an adjoining owner.[31]

For the purpose of sustaining the validity of a location or patent of land containing this class of deposits, an apex may be presumed. But it does not follow that an extralateral right may be predicated upon the presumption. In most of the sulphide copper districts vertical planes have been established by agreement or

[29] Homestead Mining Company, 29 L. D. 689; Jack Pot Lode Mining Claim, 34 L. D. 470; Belligerent and Other Lodes, 35 L. D. 22.

[30] 29 Utah, 490, 83 Pac. 648, 677.

[31] The supreme court of the United States, without intimating agreement or disagreement with this statement, held that it was not necessary to the decision. Mammoth M. Co. v. Grand Central M. Co., 213 U. S. 72, 77, 29 Sup. Ct. Rep. 413, 53 L. ed. 702. See, also, Golden v. Murphy, 31 Nev. 395, 103 Pac. 394, 405, 105 Pac. 99.

common understanding. If, technically speaking, an extralateral right could be legally predicated in this class of deposits, the "common law" of the district would undoubtedly follow the precedent set by Leadville in dealing with the blanket deposits of that region, resulting practically in the denial of extralateral rights.[32]

§ 584. Vein entering and departing through the same side-line.—In the first edition of this treatise, the author was impressed with the view that under no circumstances could there be any extralateral right attaching to a location where the vein on its course enters and departs through the same side-line as indicated on figure 62.

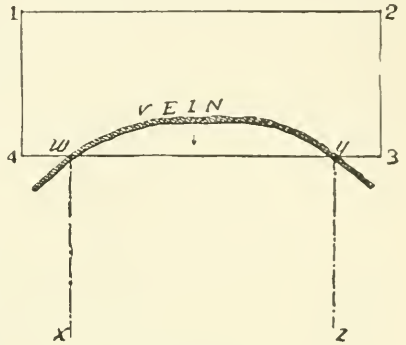


FIGURE 62.

The liberal spirit exhibited by the courts in recent years in interpreting the mining laws, and the manifest tendency to uphold the extralateral right wherever it can be done without violence to the letter or obvious intent of the law, induces us to refrain from making any dogmatic assertions as to the extralateral right which may or may not be awarded to a location of the class under consideration. If we are to consider solely the avowed object of the statute so frequently announced by the courts, that a locator should have as much of the vein underneath the surface as he has apex within the sur-

[32] For discussion of the Leadville cases, see *ante*, § 311.

face, this object would be satisfied by constructing planes parallel to the lines *2-3* and *1-4* at the points of entrance and departure, *w* and *y* resulting in the end-line planes *w-x* and *y-z*. The supreme court of Colorado gives expression to this principle and strongly intimates, at least in cases of patented claims, that the end-lines of the location as fixed by the locator and patented should control the extralateral right on all veins and under all circumstances.[33] Nevertheless we are admonished that end-lines are not those necessarily so called by the locator. The legal end-lines are those crossed by the lode, whether so intended by the locator or not.[34] In this aspect of the situation, there would be no warrant for adopting planes parallel to *2-3* and *1-4*, as the lode crosses neither of them. And yet the lines *1-2* and *3-4*, located as side-lines for their entire length, except at or near the points of crossing, run on each side of the course of the vein. The equitable rule contended for by Chief Justice Waite and Justice Bradley in the Horseshoe case, heretofore noted,[35]—that is, the application of end-line planes crosswise of the lode, applied at the points of entrance and departure,—would in the case illustrated produce the planes *w-x* and *y-z* (figure 62), practically the same result as would flow from the application of planes parallel to the course of the lines which the locator called end-lines. But, as we have seen, the majority of the

[33] Ajax M. Co. v. Hilkey, 31 Colo. 131, 102 Am. St. Rep. 23, 72 Pac. 447, 450, 62 L. R. A. 555, 22 Morr. Min. Rep. 585.

[34] Walrath v. Champion M. Co., 171 U. S. 293, 307, 18 Sup. Ct. Rep. 909, 43 L. ed. 170.

[35] *Ante*, § 582, p. 981.

court in that case condemned this method of equitable adjustment.

The application of the end-line planes *w-x* and *y-z* (figure 62) would also apparently fall within the sanction of the rule suggested by Judge Hawley, to be noted more critically in a subsequent section.[36] His suggestion may be illustrated by reference to figure 63. Said the judge (bracketed remarks are ours):—

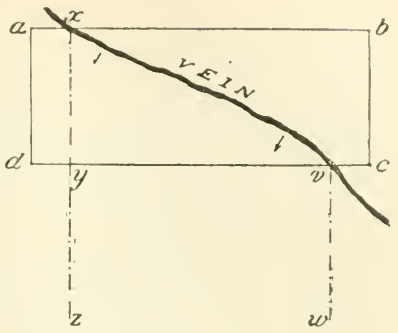


FIGURE 63.

> Let us suppose a location made under the act of 1872 in the form of a parallelogram fifteen hundred feet in length and six hundred feet in width; that the lode enters one of the side-lines within five feet of one of the end-lines of the location; that it then continues upon its strike nearly parallel with the side-lines until it comes within five feet of the other end-line, and then changes its course so as to cross the other side-line. This lode does not pass through either end-line [so called by the locator] yet under the rule announced in the Tyler cases [vein crossing one end-line and a side-line][37] the locator would be entitled to fourteen hundred and ninety feet lengthwise upon the lode and to follow it that distance upon its dip vertically downward, as expressed in the statute. I am of the opinion that in such cases the statute is definite enough and clear enough to make the end-lines parallel at the point of the entrance and departure of the lode across the side-lines, and to draw them crosswise of the general course

[36] *Post*, § 586—Vein crossing two opposite parallel side-lines.

[37] *Post*, § 591.

of the lode within the limits of the surface location, and that this should always be done so as to give to the locator just what the statute intended he should have, instead of depriving him of all extralateral rights because, by some mistake or oversight in marking his lines, or by lack of judgment or knowledge as to where the lode ran, he had failed to get his end-lines exactly parallel with the lode, and has marked his end-lines at a point beyond where the lode was found to exist upon its strike within the surface of his location.[38]

The supreme court of Colorado criticises this view as introducing a feature of uncertainty in mining titles and that it is in irreconcilable conflict with the decision of the supreme court of the United States in the Amy & Silversmith case.[39]

Judge Hawley's views would, in the case illustrated in figure 63, result in the constructed end-line planes *x-y-z* and *v-w*. If this should be accepted as the correct rule, there is no reason why the same doctrine should not be applied to the case illustrated on figure 62, giving the end-line planes *w-x* and *y-z*.

It would seem that if the apex should be found entirely within the location, breaking off at both ends, without crossing either end or side lines, the extralateral right would be upheld.[40]

But the embarrassment surrounding the application of Judge Hawley's views to the hypothetical case under consideration is manifest. He adopts the views of Chief Justice Bradley in his dissenting opinion in

[38] Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. 540, 547, 18 Morr. Min. Rep. 113.

[39] Catron v. Old, 23 Colo. 433, 58 Am. St. Rep. 256, 48 Pac. 687, 689, 18 Morr. Min. Rep. 569. See, also, Ajax G. M. Co. v. Hilkey, 31 Colo. 131, 102 Am. St. Rep. 23, 72 Pac. 447, 450, 62 L. R. A. 555, 22 Morr. Min. Rep. 585, where this criticism is explained.

[40] *Post*, § 592.

the Horseshoe case, heretofore referred to, and uses his precise language in defining the direction, and points where the planes are to be established. The difference between the views of the majority and minority of the court in that case are emphasized by the later opinion of the same court in the Del Monte case, wherein the court, after quoting the dissenting opinion in the Horseshoe case and stating the result reached by the majority in that case, said:—

> In other words, the court took the location as made on the surface by the locator, determined from that what were the end-lines, and made those surface lines controlling upon his rights, and rejected the contention that it was proper for the court to ignore the surface location and create for the locator a new location whose end-lines should be crosswise of the general course of the vein as finally determined by explorations.[41]

In speaking of certain proposed equitable solutions of some of the extralateral-right problems, and pointing out that their proper determination depends upon the construction of the statute, and not upon equitable principles, the court said:—

> We make these observations because we find in some of the opinions assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps those rules may have all the virtues which are claimed for them, and, if so, it were well if congress could be persuaded to enact them into a statute; but be that as it may, the question in the courts is not what is equity but what saith the statute.[42]

[41] Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 69, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370. See Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 974.

[42] These expressions were undoubtedly called forth by the famous and somewhat caustic opinion of the late Judge De Witt in the case

When we consult the adjudicated cases we find that the questions suggested by figure 62 have received but little attention. But if we may consider the general statements and phrases employed by the courts in reaching results in other and somewhat cognate situations,—e. g., the case where a vein crosses two parallel side-lines,[43] or where it enters one end-line and passes out through a side-line,[44] or when it crosses one end-line and terminates within the claim without reaching the other, or where the apex is entirely within the location but crossing none of its boundaries,[45] and the application of end-line planes in cases of secondary veins[46]—there is something to encourage the belief that when the question discussed in this section confronts the supreme court of the United States, it *may* see its way clear to apply some rule of construction which will award an extralateral right in the class of cases under present consideration.

A case analogous in principle to that shown in figure 62 was considered by the supreme court of Colorado.[47]

The controversy arose out of the following state of facts, which may be readily understood by reference to figure 64, a reproduction of the diagram accompanying the opinion of the court.

Plaintiff owned the Smuggler, defendants the Fulton and Mendota claims. The dotted line shows the

of Fitzgerald v. Clark, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273, 30 L. R. A. 803, the judgment in which was affirmed by the supreme court of the United States, following the Del Monte case, 171 U. S. 92, 18 Sup. Ct. Rep. 895, 43 L. ed. 87, 19 Morr. Min. Rep. 370, *sub. nom.* Clark v. Fitzgerald.

[43] *Post*, §§ 586, 587, 588.

[44] *Post*, § 591.

[45] *Post*, § 592.

[46] *Post*, §§ 593, 594.

[47] Catron v. Old, 23 Colo. 433, 58 Am. St. Rep. 256, 48 Pac. 687, 18 Morr. Min. Rep. 569.

apex through the claims. The dip is to the south. All the properties were patented, and there was no surface conflict involved. Defendants, in following the vein on its course downward, penetrated underneath the Smuggler surface and had extracted ore from the vein, the point of the alleged trespass being designated on the diagram by the letter A. The defendants justified their presence underneath the Smuggler surface by asserting ownership of the apex in the Fulton ground and the right to pursue the vein in depth by reason of such apex ownership. The court below sustained the contention of the defendants. Hence the appeal.

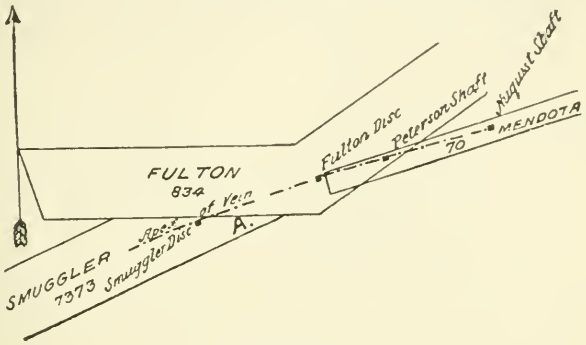


FIGURE 64.

The appellate court, after reviewing most of the end-line cases to be hereafter noted, reversed the judgment, thus expressing its views:—

> In the case at bar, no part of the Fulton vein runs parallel or nearly parallel with the side-lines of that claim, as staked upon the surface. The United States supreme court has said that if the locator of a mining claim mistakes the direction of his vein, and locates accordingly, the courts have no power to make a new location for him, but must determine his rights with reference to the location actually made. Developments subsequent to the location of the Fulton disclose that the claim as located con-

tains very little of the apex of the vein, and such as it does contain does not cross either end-line, and does not run parallel or nearly parallel to the side-lines; so that in no aspect of the law can the Fulton be allowed extralateral rights by reason of the apex of the vein.[48]

It does not seem possible to assail this ruling of the supreme court of Colorado, or to concede any extralateral right to the Fulton claim upon the facts presented, without resorting to the equitable doctrine hereinbefore referred to as having been repudiated by the supreme court of the United States.

It has been said, however, by a recent writer[49] that the doctrine of this case has been repudiated by the

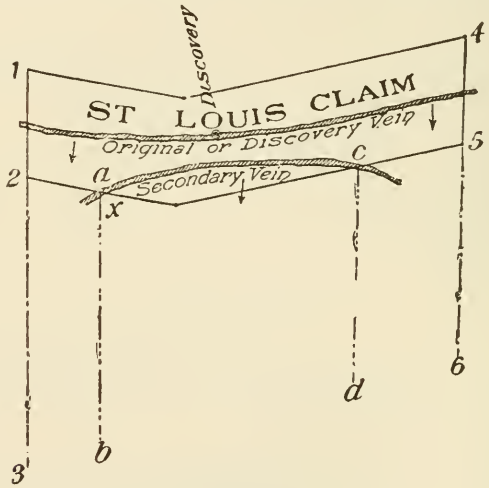


FIGURE 65.

circuit court of appeals, ninth circuit, in the case of St. Louis M. & M. Co. v. Montana M. Co., Ltd.,[50] the facts of which may be outlined by reference to figure 65.

[48] Id., 23 Colo. 433, 58 Am. St. Rep. 256, 48 Pac. 687, 690.

[49] "A Problem of Mining Law," Harvard Law Review, vol. xvi, No. 2 (Dec. 1902), pp. 94, 101.

[50] 102 Fed. 430, 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725.

The St. Louis company owned the St. Louis claim, for which a patent had been issued, based upon the discovery of the original or discovery vein. The end-lines of the claim were parallel, were crossed by the lode, and the extralateral right on the discovery vein, under this state of facts,[51] must be assumed. Subsequently another vein, marked on the diagram "secondary vein," was discovered crossing a side-line in a similar manner as appeared in the Colorado case. Both veins dipped in the same direction, as indicated by the arrows. The Montana company owned the Nine-Hour claim. The ore bodies in controversy were on the secondary vein underneath the surface of that claim, at the place indicated by the letter X.

The court awarded the extralateral right on the secondary vein to the St. Louis company by applying planes parallel to the plane of the end-line on the discovery lode, at the points where the footwall of the vein crossed the side-line resulting in the planes *a-b* and *c-d*, awarding the ore bodies in dispute to the St. Louis. The court supported its ruling in this behalf by the application of the doctrine previously announced by it in another case that "Where the end-lines of a mining claim are once fixed, they bound the extralateral rights to all the lodes that are thereafter found within the surface lines of the location,"[52] which doctrine has received the express sanction of the supreme court of the United States.[53]

Judge Ross dissented in the St. Louis-Montana case, and expressed himself as in favor of a rehearing, for

[51] See statement of facts, 104 Fed. 665, 44 C. C. A. 120, 56 L. R. A. 725.

[52] Walrath v. Champion M. Co., 72 Fed. 978, 979, 19 C. C. A. 323.

[53] Walrath v. Champion M. Co., 171 U. S. 293, 308, 18 Sup. Ct. Rep. 909, 43 L. ed. 170.

the principal reason that the question here discussed was not properly presented for decision.[54]

The case was taken on writ of error to the supreme court of the United States, but the writ was dismissed upon the ground that the judgment of the circuit court of appeals was not a final one.[55]

At a later date, however, after a retrial in the lower court and decision by the circuit court of appeals sustaining, as the "law of the case," the views hereinbefore stated,[56] the case reached the supreme court of the United States, which tribunal reversed the circuit court of appeals without specifically passing upon the question here involved.[57] In the last decision of the circuit court of appeals in this litigation [58] it is said that its ruling as to the extralateral right had been affirmed by the supreme court of the United States in its opinion reversing the first decision of the court of appeals.[59] If this be true, it is only by inference.

The distinction between the Colorado case and the St. Louis-Montana case is apparent. In the Colorado case the end-lines had not been "fixed"; there was no line crossed by any lode except the side-line, and none which possessed the attributes of a legal end-line the planes of which could be applied to the side-line under any recognized rule. The vein crossing the side-line in the Colorado case was the *discovery* vein. We are

54 104 Fed. 669, 44 C. C. A. 120, 56 L. R. A. 725; Iron S. M. Co. v. Elgin M. Co., 118 U. S. 196, 198, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98, 15 Morr. Min. Rep. 641.

55 Montana M. Co. v. St. Louis etc. M. Co., 186 U. S. 24, 22 Sup. Ct. Rep. 744, 46 L. ed. 1039.

56 147 Fed. 897, 78 C. C. A. 33.

57 204 U. S. 204, 27 Sup. Ct. Rep. 254, 51 L. ed. 444.

58 Montana M. Co. v. St. Louis M. & M. Co., 183 Fed. 51, 61, 105 C. C. A. 343.

59 204 U. S. 204, 27 Sup. Ct. Rep. 254, 51 L. ed. 444.

hardly prepared to admit that the circuit court of appeals has necessarily disputed the doctrine of Catron v. Old, a case which it neither cited nor referred to.

There are several difficulties suggested arising out of the facts appearing in the St. Louis-Montana case which will be reserved for future discussion.[60]

§ 585. **The extralateral right applied to the ideal lode.**—We have in preceding sections given our conception of the ideal lode,[61] and have illustrated what we understand to be the highest type of a location embracing it,[62] one which confers upon the possessor the greatest property right which may be acquired under the mining laws. With this ideal lode in position within the boundaries of such a location, if we may assume that the vein in its descent into the earth to an indefinite depth is continuous, that its identity is unquestioned, and that there are no natural or legal obstacles intervening, we have presented a standard with which all cases of all classes may be compared and analyzed. It is upon the existence of such a theoretical lode and hypothetical location that the existing laws were framed.

As Dr. Raymond facetiously remarked,—

> If all mining properties presented this beautiful simplicity of structure, and all mining locators exhibited a corresponding simplicity of purpose, the application of the law would be easy. But the *naïveté* of the statute fares badly between the freaks of nature and the tricks of man.[63]

We need devote no time to the consideration of extralateral rights flowing from ideal locations embracing

60 *Post*, § 593.
61 *Ante*, § 309.
62 *Ante*, § 360.
63 "Law of the Apex."

ideal lodes. This right may be curtailed or interrupted by underground conflicts with prior appropriators of other segments of the same vein, or by encountering a vertical bounding plane of some prior grant, out of which the underlying vein was not reserved, or its continuity may be broken and its identity lost. But with these subjects we shall deal later. Eliminating these elements from present consideration, the possessor of the ideal lode, ideally located, has the same length on the vein throughout its entire depth as he has included within his boundaries at the surface, and this was the unquestionable intent of the law, in providing that the end-lines should be parallel. To this extent the locator becomes the owner of the vein. His estate therein is that of a fee.

§ 586. Vein crossing two parallel side-lines—The Flagstaff case.—One of the most frequent disappointments which fall to the lot of the lode locator arises from his mistaking the course of his vein, and constructing his location across instead of along it. The first instance of this which was brought to the attention of the supreme court of the United States arose in the Flagstaff case, in Utah, and involved the construction of a patent issued under the act of 1866. For the first time the miner was brought to a realizing sense that a United States patent issued under that act did not confirm to him everything which he expected and theretofore had claimed. Its "ironclad potency" shattered his early idols, and there was a rude awakening to a new order of things. After having fixed his location on the surface, filed his diagram, and received his patent, he learned that his rights to the lode were to be determined and measured by the boundaries defined therein. He could no longer follow his lode on

its course whithersoever it might run, regardless of lines, stakes, and monuments. He could only take so much on the strike of the vein as was included within his patented lines. What was excluded became the subject of appropriation by the next comer.

In a preceding section [64] we have presented in outline a diagram of the property involved in the Flag-

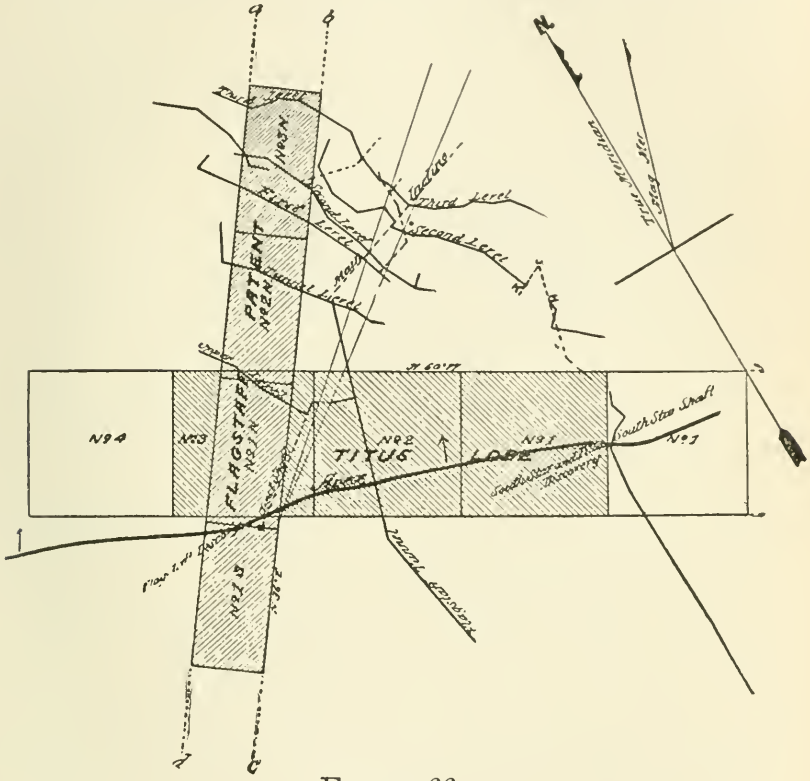


FIGURE 66.

staff case, for the purpose of illustrating this principle. As this case was the forerunner of several others,—a mold into which others were ultimately cast,—it will

[64] *Ante*, § 60.

not be out of place to present a diagram somewhat more elaborate in design than that appearing in the historical portion of this treatise.

Figure 66 shows the surface lines, the course of the outcrop or apex through the Titus and Flagstaff, and in horizontal projection the nature and extent of the latter's underground workings. The alleged trespass occurred in the underground workings in the vicinity of the triangle, K-J-H, but the controversy necessarily involved all excavations of the vein lying easterly of the east line of the Flagstaff and north of the Titus north boundary. Neither party claimed the surface overlying this segment of the vein.

The decision of the supreme court of the United States established two important basic principles:—

(1) A vein cannot be pursued on its course beyond the lines which it actually crosses. The patentee takes only so much of the vein as his location actually covers. Where such vein crosses two opposite side-lines, these lines become, in law, the true end-lines of the location;

(2) The right to follow the dip of the vein is bounded by the end-lines, properly so called, which lines are those which are crosswise of the general course of the vein on the surface.[65]

The segment of the vein in dispute was not within planes drawn through these side-end lines. It per-

[65] Flagstaff M. Co. v. Tarbet, 98 U. S. 463, 468, 25 L. ed. 253, 9 Morr. Min. Rep. 607, referred to and doctrine approved, Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370; Empire M. & M. Co. v. Tombstone M. & M. Co., 100 Fed. 910, 913; S. C., on the merits, 131 Fed. 339; Southern Nevada G. & S. M. Co. v. Holmes M. Co., 27 Nev. 107, 103 Am. St. Rep. 759, 73 Pac. 759, 760. See, also, Jefferson M. Co. v. Anchoria Leland M. & M. Co., 32 Colo. 176, 75 Pac. 1070, 1073, 64 L. R. A. 925.

tained to the overlying apex within the Titus ground. The judgment against the Flagstaff was affirmed.

The same doctrine had been previously announced by the supreme court of Colorado,[66] and by the supreme court of Utah, in the Flagstaff case,[67] and in another case involving the Flagstaff patent.[68]

§ 587. **Same—The Argentine-Terrible case.**—The case of the Argentine Mining Company v. Terrible Mining Company[69] seems to present a case on parallel lines with that of the Flagstaff case, so far as the physical facts are concerned. We herewith present a diagram (figure 67) of the properties involved, reduced from the atlas of Mr. Emmons, accompanying his excellent monograph, "Geology and Mining Industry of Leadville."

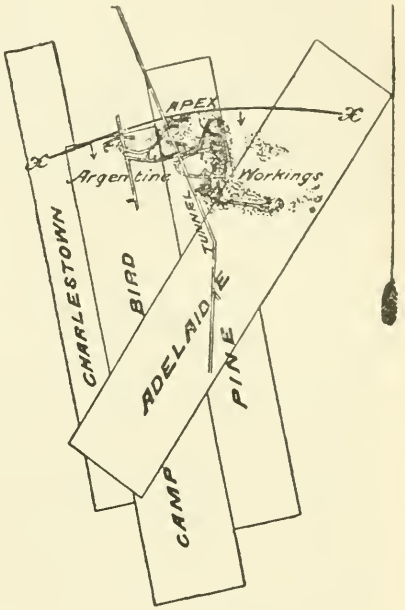


FIGURE 67.

Reading the opinion of the supreme court of the United States in the Argentine-Terrible case in connection with this figure, justifies the conclusion that the conditions

[66] Wolfley v. Lebanon M. Co., 4 Colo. 112, 13 Morr. Min. Rep. 282 (April, 1878).

[67] June, 1878, unreported.

[68] McCormick v. Varnes, 2 Utah, 355, 9 Morr. Min. Rep. 505 (Feb. 1879).

[69] 122 U. S. 478, 7 Sup. Ct. Rep. 1356, 30 L. ed. 1140.

shown upon Mr. Emmons' maps existed at the time of the trial of the case, and that upon the state of facts thus illustrated the decision was based. Assuming that the course of the apex is correctly delineated by the line *x-x*, we have, as in the Flagstaff case, the lode crossing parallel lines, which the locator supposed were side-lines, but which in law were end-lines. The locations were all made under the act of 1872. The Adelaide was the prior location. The Argentine company, owning the Pine and Camp Bird claims, extended its workings beyond its side-end-line planes, underneath the surface of the Adelaide, asserting its right to do so by reason of ownership of the apex within the boundaries of the Pine. A patent had been issued to the Pine, out of which there was excepted so much of the surface as conflicted with the Adelaide boundaries.

At the trial of the case Judge Hallett ruled "that a location is held valid only to the extent of the lode which is included within it."[70]

The supreme court of the United States, after quoting the doctrine of the Flagstaff case, said:—

> Such being the law, the lines which separate the location of the plaintiff below from the locations of the defendant are end-lines, across which, as they are extended downward vertically, the defendant cannot follow a vein, even if its apex or outcropping is within its surface boundaries, and as a consequence could not touch the premises in dispute, which are conceded to be outside of those lines and outside of vertical planes drawn downward through them.

Manifestly, the Flagstaff and Argentine cases were parallel as to the facts. The supreme court of the

[70] Terrible M. Co. v. Argentine M. Co., 5 McCrary, 639 (re-reported), 89 Fed. 583.

United States having in the former case emphasized the controlling force of surface-lines as fixed by the patent, and established the rule that when the lode crossed a line which the locator called a side-line such line became in law an end-line, to the extent, at least, that the lode could not be followed beyond it, the application of the same principle to locations made under a law which required, as a condition precedent to a valid appropriation, the defining of a surface and marking of boundaries including the discovered lode, was logical and consistent.[71]

§ 588. **Same—The King-Amy case.**—Three years after the decision in the Argentine-Terrible controversy, what is familiarly known as the King-Amy (or

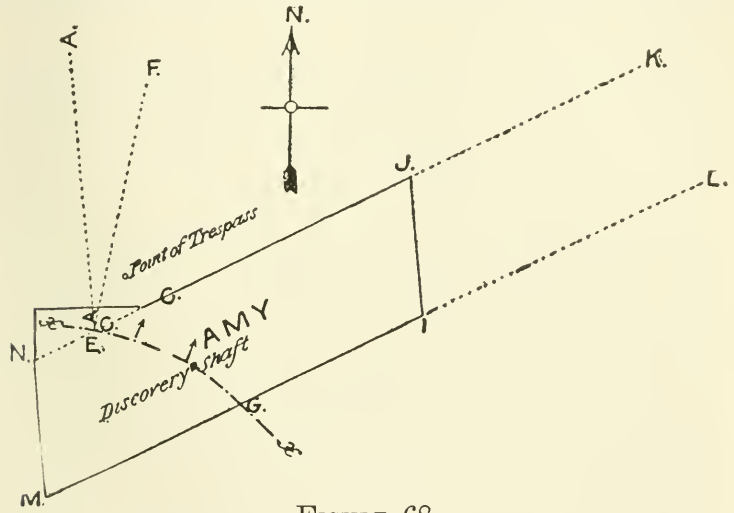


FIGURE 68.

Silversmith) case, came before the supreme court of Montana. The facts were precisely the same as in the

[71] The Argentine-Terrible case was referred to and the doctrine approved in Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

Flagstaff and Argentine cases; that is to say, the location was regular in form, and instead of being laid along the lode it was placed across it, so that the vein entered through one side-line and departed through the other, as shown in figure 68. The only variation observable is, that in the Flagstaff and Argentine cases the lode crossed the two side-lines, substantially at right angles, while in the King-Amy case the lode, *x-x*, crossed the claim diagonally, the dip being in the direction indicated by the arrows.

There were three contentions presented for the consideration of the court:—

(1) That the Amy could not pass to the north of a vertical bounding plane drawn through the north side-line, N-J, invoking the doctrine of the Flagstaff and Argentine cases;

(2) That a plane should be drawn at right angles to the course of the vein, through the point E, where the vein crossed the north side-line, N-J, producing the imaginary bounding plane, E-F;

(3) The application, through the same point, of a plane parallel to the located west-end line, M-N, producing the imaginary plane, A-A.

The trial court adopted, on its own motion, the second, or right-angle theory.

The supreme court of Montana, speaking through Judge De Witt,[72] admitted that neither one of the three suggested solutions was absolutely free from possible criticism, but in a very interesting and ingenious opinion adopted the third theory, of applying a plane parallel to the one drawn through the line which the locator called an end-line, but which was not in fact

[72] King v. Amy & Silversmith Cons. M. Co., 9 Mont. 543, 24 Pac. 200, 203, 16 Morr. Min. Rep. 38.

crossed by the lode. The court saw a marked difference between the facts of this case and the Flagstaff and Argentine cases. This difference is in the angle at which the vein crossed the side-lines. The court did not clearly demonstrate where it would draw the east end-line, in view of the crossing at G. The decision was an heroic attempt to fulfill what the court conceived to be the spirit of the statute, but it was unavailing. The supreme court of the United States adhered to its previous doctrine, and in reversing the judgment of the supreme court of Montana said:—

> The difficulty in the present case arises from the course of the vein or lode upon which the Amy location was made. It is evident that what are called side-lines of the location, as shown in the diagram, are not such, in fact, but are end-lines. Side-lines properly drawn would run on each side of the course of the vein or lode, distant not more than three hundred feet from the middle of such vein. In the Amy claim the lines marked as *side*-lines cross the course of the strike of the vein, and do not run parallel with it. They therefore constitute end-lines. . . . . The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give the miner such rights as his imperfect location warrants under the statute. It cannot relocate his claim, and make new side-lines or end-lines. Where it finds, as in this case, that what are called *side*-lines are in fact *end*-lines, the court in determining his lateral rights will treat such side-lines as end-lines; but the court cannot make a new location for him, and thereby enlarge his rights. He must stand upon his own location, and can take only what it will give him under the law.[73]

[73] King v. Amy & Silversmith Cons. M. Co., 152 U. S. 222, 228, 14 Sup. Ct. Rep. 510, 38 L. ed. 419, 18 Morr. Min. Rep. 76, approved in Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

Necessarily the supreme court of the United States considered the facts of this case to be parallel with those in the Flagstaff and Argentine cases, although neither of these cases are cited in the opinion, the court resting its judgment on its opinion in the Elgin, or "Horseshoe," case.

The opinion of Judge De Witt in the King-Amy case, or, rather, the reasoning upon which it is based, has, however, borne some fruit, as we will observe when dealing with cases where the vein crosses a side and an end line.

In the numerous cases arising in the Coeur d'Alenes, Idaho, between the Bunker Hill and Sullivan Mining and Concentrating Company, the Last Chance Mining Company and its successor, the Empire State-Idaho Mining and Development Company, several instances of the vein crossing two parallel side-lines occurred. The original prospectors in the region mistook the course of the upturned bedding planes of the quartzites as indicating the course of the vein, and made their locations accordingly. Subsequent developments demonstrated the fact that the master fissure which formed the footwall of the vein cut the bedding planes of the quartzites diagonally, so that the apex of the vein crossed the lines located as side-lines. This was the case with the Bunker Hill, the first location in the district, the Stemwinder and the Last Chance adjoining. The litigation involving the Bunker Hill claim presented the question here under discussion unaccompanied by complications which arose in the cases of the Stemwinder and Last Chance. The rule that where the vein crosses two opposite parallel side-lines, these lines became the end-lines, was clearly and concisely stated in all of these cases.[74]

[74] Bunker Hill Extralateral, 131 Fed. 579, 588, 66 C. C. A. 299; *certiorari* denied, 200 U. S. 617, 26 Sup. Ct. Rep. 754, 50 L. ed. 622; Stem-

It may be considered as absolutely and finally settled that where a vein on its course crosses two opposite side-lines, the vein cannot be followed either on its dip or strike beyond vertical planes drawn through the side end-lines, and that the angle at which it crosses these side-lines makes no difference in the application of the principle.

This is a concise statement of the present condition of the law upon this subject as declared by the supreme court of the United States.[75]

§ 589. Deductions from side-end-line cases—Extralateral right in such cases defined by vertical planes drawn through the side-end lines produced.—Justice Brewer, in speaking for the supreme court of the United States in the Del Monte case, said:—

Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface. Second, the end-lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third, every vein, "the top or apex of which lies inside of such surface-lines extended downward vertically" becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side-lines, although in so doing he enters beneath the surface of some other proprietor. Fourth, the only exception to the rule that the end-lines of the location as the locator places them establish the limits beyond which he may not go in the

winder Extralateral Involving Last Chance, 131 Fed. 591, 605, 66 C. C. A. 99; appeal dismissed, 200 U. S. 613, 26 Sup. Ct. Rep. 754, 50 L. ed. 620; *certiorari* denied, 200 U. S. 617, 26 Sup. Ct. Rep. 754, 50 L. ed. 622; S. C., opinion of trial court, 134 Fed. 268.

[75] Parrot S. & C. Co. v. Heinze, 25 Mont. 139, 87 Am. St. Rep. 386, 64 Pac. 326, 328, 53 L. R. A. 491, 21 Morr. Min. Rep. 232. See, also, Stewart M. Co. v. Ontario M. Co. (Idaho), 132 Pac. 787, 793.

> appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case, the law declares that those which the locator called his side-lines are his end-lines, and those which he called his end-lines are in fact side-lines, and this upon the proposition that it was the intent of congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location[76] [that is, those which are crossed by the lode on its course].[77]

This leaves little else to be said.

None of the side-end-line cases heretofore reviewed give countenance to the suggestion that where a vein crosses two opposite parallel side-lines, the locator is denied all extralateral right. On the contrary, the irresistible conclusion to be drawn from each of them is, that vertical planes drawn through the side-end lines, produced in the direction of the downward course from the apex, will carve out a segment of the ledge throughout its entire depth, which will belong to the locator.[78] So in the Flagstaff case, the side-end lines *d-a* and *c-b* (figure 66), produced northerly indefinitely, bound the extralateral right. In the Argentine case (figure 67) the original side-lines of the Adelaide, extended southwesterly, define its limits. The extralateral right of the Pine, Camp Bird, and Charlestown is interrupted by a prior valid appropriation of that segment of the vein underlying the Adelaide apex. Were it not for such interruption, their right of lateral pursuit would

[76] Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 89, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[77] Walrath v. Champion M. Co., 171 U. S. 293, 307, 18 Sup. Ct. Rep. 909, 43 L. ed. 170.

[78] Empire M. & M. Co. v. Tombstone M. & M. Co., 100 Fed. 910, 913; Cosmopolitan M. Co. v. Foote, 101 Fed. 518, 521.

be defined by extending *their* side-end lines southerly. As to whether the Pine, Camp Bird, and Charlestown would own the segments of the vein within their respective extended side-end-line planes beyond the conflict with the Adelaide depends upon the correctness of the views discussed in a subsequent section.[79]

In the King-Amy case (figure 68) planes drawn through the side-end lines, N-J and M-I, produced indefinitely in the direction of K and L respectively, will bound the extralateral right.

A simple illustration of this is shown in figure 69, the bounding dip planes in each instance being defined by the produced side-end lines, *a-b-b'*, *c-d-d'*. These side-end lines are to be treated as if they were the *original end-lines*. Being parallel, the right of lateral pursuit cannot be gainsaid. A location in such a form would be valid to the extent, at least, that it inclosed the apex. It is true that the end-side lines may be more than three hundred feet from the center of the vein, but in any event this would not render the location wholly void. The excess might be cast off,[80] leaving the extralateral right unaffected.[81] Subsequent locators of the apex on the outside of the crossed side-end lines could not complain.

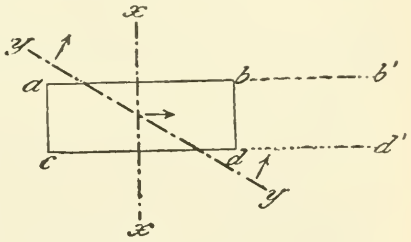


FIGURE 69.

79 *Post*, § 596.

80 *Ante*, § 362.

81 See, also, Lakin v. Dolly, 53 Fed. 333, 339; Taylor v. Parenteau, 23 Colo. 368, 48 Pac. 505, 507; Bonner v. Meikle, 82 Fed. 697, 705, 19 Morr. Min. Rep. 83; Cosmopolitan M. Co. v. Foote, 101 Fed. 518, 522; *ante*, § 366.

As to patents issued in such form and under such conditions, we will consider them in a subsequent chapter.

Judge J. H. Beatty, in the last trial of Tyler Mining Company v. Last Chance Mining Company,[82] adopted the view herein announced as to bounding planes to be drawn through side-end lines. This ruling of Judge Beatty's was accepted by the circuit court of appeals for the ninth circuit,[83] was quoted with approval by the supreme court of the United States,[84] and was followed in the Bunker Hill and Stemwinder cases arising in the Coeur d'Alene, in Idaho, to which we have heretofore alluded.[85]

In applying the decisions in these end-line cases we are forced to recognize the fact that all theories based upon the *true course* or the *true dip* of veins are purely speculative. When the law says that end-lines are those which are crossed by the lode, it does not imply that they shall be crossed at a right angle. As was said by the circuit court of appeals, ninth circuit, in the Bunker Hill case:—

> While the statute requiring parallelism of the end-lines and the courts have held that they may not be laid so divergent as to include more in length upon the dip of the vein than is allowed in length upon the surface, neither the statute nor any decision to which our attention has been called defines any particular angle at which the end-line shall cross the general course of the vein in order that the extralateral right given by the statute may exist.[86]

[82] 71 Fed. 848, 851, 18 Morr. Min. Rep. 303.

[83] Tyler M. Co. v. Sweeney, 79 Fed. 277, 280, 24 C. C. A. 578.

[84] Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 91, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[85] *Ante*, § 588.

[86] Last Chance M. Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 579, 590, 66 C. C. A. 299.

So the downward course of the vein which may be followed in the exercise of the extralateral right is not necessarily at right angles to the strike or true course. It is that direction which the vein takes underneath the surface, on its downward course from the apex, between vertical planes drawn through the end-lines, or the side-end lines, as the case may be. This gives a segment in length, throughout the depth, within vertical planes drawn through the parallel crossed lines, equal to the length of apex covered by the surface boundaries, measured, of course, on lines on the plane of the vein, which necessarily would be, save for possible "warping" or local curving, parallel to the course of the apex.[86a]

We have heretofore discussed the meaning of "downward course" used in the statute, and reached the conclusion that it means downward from a higher to a lower level in the plane of the vein along the intersecting end-line or side-end-line plane.[87]

In dealing with the subject of locations in a preceding chapter,[88] we have attempted to demonstrate that end-lines may take any direction so long as they cross the apex of the vein and are parallel.

§ 590. Vein crossing two opposite nonparallel side-lines.—In a preceding section, when considering the form of a surface location, we have indicated that there is no requirement of the law that side-lines should be parallel, but have there said that the parallelism or nonparallelism of the lines originally located as side-

86a Stewart Mining Co. v. Ontario Mining Co. (Idaho), 132 Pac. 787, 792.

87 *Ante*, § 319.

88 *Ante*, § 365.

lines might become an important factor, if the locator makes a mistake as to the course of his vein and locates crosswise, instead of along its course. We had reference to the extralateral right.

If we have correctly stated the law applicable to cases of end-lines converging in the direction of the downward course,—that is, that in such instances the vein may be pursued within vertical planes drawn through such end-lines produced in such direction,[89]—and are justified in the deductions announced in the preceding section, that parallel side-end lines may be produced in the direction of the dip for the purpose of defining the extralateral right, it follows as a corollary that in case of nonparallelism of side-end lines the extralateral right is granted where such lines converge in the direction of the dip, as shown in figure 70, and denied where they diverge, as illustrated in figure 71.

FIGURE 70.

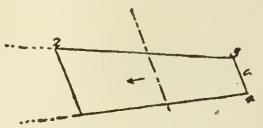


FIGURE 71.

In our judgment, there can be no possible objection to this rule. It logically flows from the reasoning which supports the decisions making the crossed lines end-lines in law, and harmonizes with the theories invoked in support of most of the adjudicated cases. It gives to the miner as much of the vein as the imperfect manner in which his location is made will permit, in the light of established legal principles, and is in consonance with the underlying theories upon which these principles rest.

[89] *Ante*, § 582. See, also, discussion of this subject as applied to locations made under the act of 1866, *ante*, § 574.

§ 591. Vein crossing one end-line and a side-line.— It often happens that the vein, instead of pursuing a direct course through the claim from end-line to end-line, diverges after entering the claim at one end-line, and passes out of a side-line, as illustrated in figure 72.

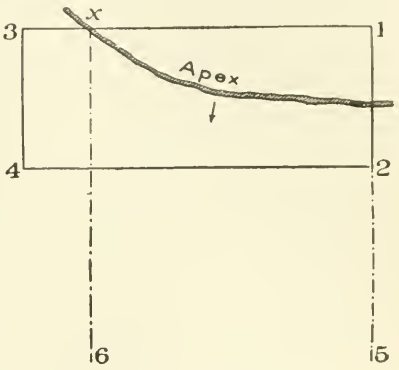


FIGURE 72.

This occurrence is found more frequently in localities where state statutes limit the width of a location to less than the maximum allowed by the federal statute, although it may happen where there is no such limitation. The locator, at the time of marking his boundaries, is rarely able to trace his vein at the surface through the entire length claimed, and the course of the apex is frequently mistaken. Of course, the existence of the conditions shown upon the figure does not invalidate the location.[90] The claimant necessarily loses the right to pursue the vein on its course beyond the crossed side-line.

As to his extralateral right under the case assumed, the law is now well settled. Such rights, as we shall see, are to be defined by establishing a plane at the point where the vein passes out of the claim through the side-line (x) parallel to the crossed end-line, producing the plane x-6.

The principle thus established has reached its present recognized force through a series of decisions, the

[90] Argonaut Cons. M. Co. v. Turner, 23 Colo. 400, 58 Am. St. Rep. 245, 48 Pac. 685, 686; Beik v. Nickerson, 29 L. D. 662.

consideration of which will be profitable as illustrating the reasoning applied to reach the ultimate result, to which reasoning it may be proper to resort in the solution of cognate or analogous problems to which the abstract rule itself might not be strictly applicable.

The first judicial announcement of the principle is found in the decision of Judge De Witt, speaking for the supreme court of Montana, in the case of King v. Amy & Silversmith Mining Co.,[91] the facts involved being shown on figure 68.[92]

We quote the following from the opinion:—

> The law intends that the plane of the end-line shall operate as a boundary to the dip, and so operate at the point where the strike is ended. If the strike reached the original end-line, as in a regular location, the bounding plane would there operate upon the dip. If the strike, by reason of its going out of a side-line, falls short of reaching the original end-line plane, that plane must take effect where the strike in fact ends,—that is, at a point on the side-line, ... and if it takes effect there, its parallelism must not be destroyed. We therefore have the bounding plane operating at the point where the apex leaves the north side-line, and operating parallel to the east end-line, and retaining its parallelism as originally marked on the ground. It is not a new line or plane, or one judicially constructed. It is determined by the location lines on the surface. There is never any readjustment according to subsequent developments. The parallelism of the end-line planes is fixed by location, and never varies. The point of departure of the strike from the surface lines fixes the point where the end-line plane is to perform its functions, whether that departure be at an end-line, as contemplated by the statute, or whether accident has fixed it at a point on a side-line.

91 9 Mont. 543, 24 Pac. 200, 205, 16 Morr. Min. Rep. 38.

92 *Ante*, § 588.

This resulted in establishing the plane E-A (figure 68). But, as was pointed out by the supreme court of the United States in its opinion reversing the supreme court of Montana,[93] the only lines of the Amy claim which were crossed by the lode were those originally located as side-lines. As the lode did not cross either line which the locator called end-lines, neither of such lines were in law end-lines, and there was no justification for the application of a plane parallel to them at the point where the vein crossed the line claimed by the locator as a side-line. As the vein in the King-Amy case crossed the locator's two parallel side-lines, they became the end-lines in law for all purposes.

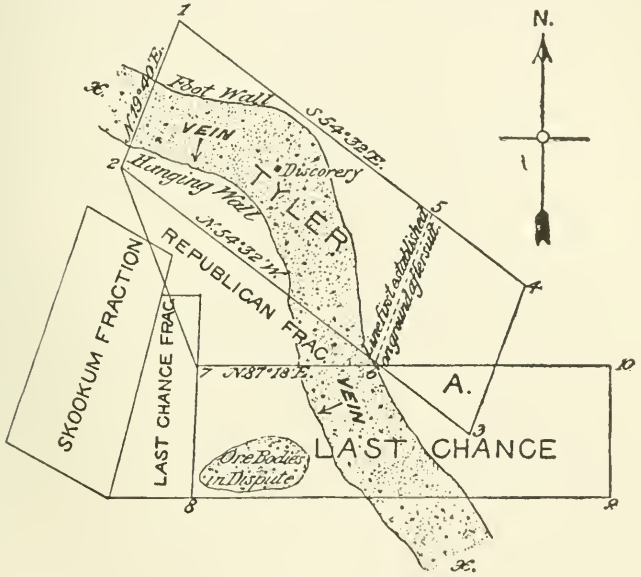


FIGURE 73.

But a logical method of solving the problem where the facts justified its application had been announced,

[93] King v. Amy & Silversmith M. Co., 152 U. S. 222, 228, 14 Sup. Ct. Rep. 510, 38 L. ed. 419, 18 Morr. Min. Rep. 76.

and the opportunity for analyzing and applying Judge De Witt's theories was soon presented to the federal tribunals.

We present in figure 73 a diagram for the purpose of illustrating the contentions of the parties and the rulings of the several courts in the case of the Tyler Mining Company v. Last Chance Mining Company, an outline of the facts of which may be briefly stated:—

The Tyler Mining Company applied for a patent for the entire area of the Tyler claim shown upon the diagram, including the triangle A, which conflicted with the Last Chance claim. The Last Chance company filed an adverse claim in the land office and instituted a suit in support of it in which it specifically alleged its priorities over the Tyler and its ownership of the conflicting area. The Tyler company answered, putting in issue the question of priority. It subsequently, however, withdrew its answer, and established an end-line (5-6) parallel to its original end-lines, thus avoiding a surface conflict.

The Last Chance, however, proceeded to judgment on the adverse suit, in which judgment the priority of the Last Chance over the Tyler was judicially established. Patent ultimately issued to the Tyler company for the Tyler claim without surface conflict with the Last Chance, and a controversy arose over ore bodies underneath the Last Chance surface. In the action to determine the ownership of these ore bodies, the Tyler extralateral right on the vein passing through an end-line and side-line of the Tyler claim as originally located was the subject of discussion, as the Tyler company asserted its priority in fact over the Last Chance. The Last Chance company denied the extralateral right claimed, and set up the fact that priority had been conclusively established in favor of

the Last Chance by the judgment taken *pro confesso* in the adverse suit. The trial court sustained the defense of former adjudication. The appellate court, however, reversed this ruling as to the effect of the judgment in the adverse suit, holding that it was not *res adjudicata* and ordered a new trial. It also took up for discussion certain exceptions to the trial court's charge to the jury on the subject of extralateral rights, and in the course of this discussion announced its approval of the rule adopted by the supreme court of Montana in the King-Amy case. Said the court:—

> An end-line may be drawn at the point where the lode abruptly terminates within the surface lines or at the point where the apex of the lode crosses the side-line of the surface location.[94]

On the second trial the Tyler company succeeded in establishing its priority over the Last Chance and its extralateral rights were defined by the trial court on the lines suggested by the appellate court.[95]

This ruling was affirmed by the circuit court of appeals on the second appeal, which court reaffirmed the doctrine that in cases where a vein crosses one end and a side-line the extralateral right is to be defined by a plane drawn parallel to the crossed end-line at a point on the side-line where the vein passes out of it.[96]

The case was then taken to the supreme court of the United States on *certiorari*, which tribunal reversed the decision of the circuit court of appeals as to the effect of the estoppel by the judgment in the adverse suit,

[94] Tyler M. Co. v. Sweeney, 54 Fed. 285, 292, 4 C. C. A. 329.

[95] Not reported.

[96] Last Chance M. Co. v. Tyler M. Co., 61 Fed. 557, 564, 9 C. C. A. 613. The same rule was applied by the court to another phase of this litigation (Republican M. Co. v. Tyler, 79 Fed. 733, 735, 25 C. C. A. 178), and also by Judge Hawley in Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. 540, 546, 18 Morr. Min. Rep. 113.

holding, in effect, that such judgment conclusively established priority in favor of the Last Chance, and such judgment could not be collaterally assailed, thus sustaining the original ruling of the trial court.[97]

An effort was made to secure from that tribunal an expression of opinion as to the true rule to be applied in the definition of the extralateral right in this class of cases. As to this the court said:—

> Our conclusions in this respect obviate the necessity of considering another very interesting and somewhat difficult question presented by counsel. It will be seen from the diagram, that according to the original location of the Tyler claim, the vein enters through an end and passes out through a side line, while by the amended location it passes in and out through end-lines. Of course, if the latter is a valid location, the owner of the claim would unquestionably have the right to follow the vein on its dip, beyond the vertical plane of the side-line. But if it were not, and the original location was the only valid one, has the owner the right to follow the vein outside any boundaries of the claim extended downward? It has been held by this court in the cases heretofore cited, that where the course of a vein is across, instead of lengthwise of the location, the side-lines become the end-lines, and the end the side lines; but there has been no decision as to what extraterritorial rights exist if a vein enters at an end and passes out of a side line. Is that a case for which no provision has been made by statute? Are the parties left to the old rule of the common law, that the owner of real estate owns all above and below the surface, and no more? Or may the court rely upon some equitable doctrine and give to the owner of the vein the right to pursue it on its dip in whatever direction it may go, within the limits of some equitably created end-lines?

[97] Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683, 15 Sup. Ct. Rep. 733, 39 L. ed. 859, 18 Morr. Min. Rep. 205.

If the common-law rule as to real estate obtains in such a case, then, of course, on the original location the owners of the Tyler claim would have no right to follow the dip of their vein outside of the vertical planes of any of its boundary lines; and even if the amended application was perfectly valid, the question would arise, whether the rights acquired under it related back to the date of the original location, or arose simply at the time of the amendment, in which case there would be no doubt of the fact that the owners of the Last Chance had, by years, a prior location. However, in the view we have taken of the other question, it is unnecessary to consider this.[98]

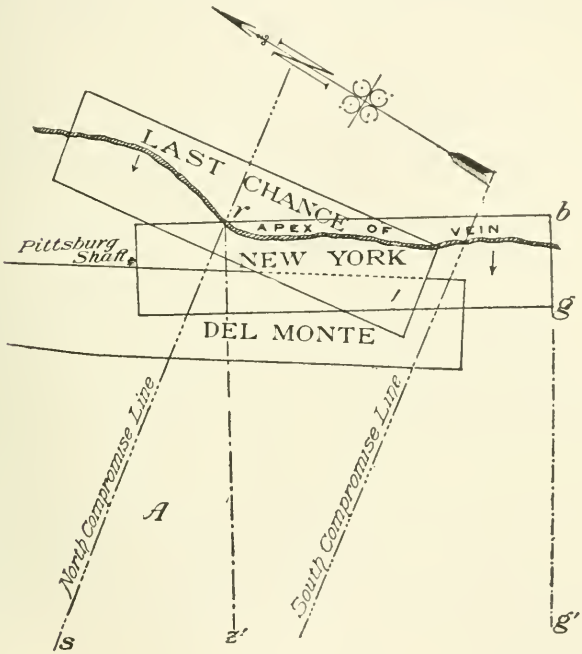


FIGURE 74.

Judge Hallett, a few weeks prior to the announcement of this opinion by the supreme court of the

[98] Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683, 694, 15 Sup. Ct. Rep. 733, 39 L. ed. 859, 18 Morr. Min. Rep. 205.

United States, in the Last Chance-Tyler controversy, decided the case of the Del Monte Mining and Milling Co. v. New York & L. C. Mining Co.,[99] wherein he applied the rules announced by the circuit court of appeals, above commented upon. We reproduce the diagram accompanying Judge Hallett's opinion, for the purpose of convenient reference (figure 74), to which we have added additional details for the purpose of better illustrating certain views of Judge Hallett outlined in the opinion.

The Del Monte Mining and Milling Company owned the Del Monte, which was prior in point of time to both the Last Chance and New York. The New York and Last Chance company owned the New York, which was prior to the Last Chance. The apex of the vein passed through the New York and Last Chance, as indicated on the figure, and in its downward course entered into and penetrated underneath the surface of the Del Monte. The controversy in the case arose over the ownership of the ore bodies underneath the surface of the Del Monte claim, and necessitated the determination of the extralateral right of the New York. The line marked "north compromise line" was established by contract between the owners of the Last Chance and New York, which contract, of course, was not operative as against the Del Monte. The extralateral right of the Last Chance was not involved. The simple question presented was substantially this: Where a vein enters an end-line and passes out of a side-line, does the extralateral right attach, and, if so, how shall it be defined?

We quote Judge Hallett's views as applied to the facts:[100]—

[99] 66 Fed. 212.

[100] 66 Fed. 214.

If the strike of the lode in the New York location kept its course from end to end of the location, the right to follow the lode outside the location would not be denied. As, however, it departs on its strike from the location on the east side, and not from the north end, it is said that the claim has no end-lines, or, at all events, none that can be recognized as limiting the right to any part of the vein outside of the exterior lines of the claim. This is asserted as a proposition of law, deducible from several decisions of the supreme court, that the lines of a location crossed by the apex of a vein on its strike shall, as to such vein, be regarded as end-lines, whatever their position may be; and if this proposition be accepted, the south end-line and east side-line intersected by the outcrop of this lode are not parallel to each other, as demanded by section twenty-three hundred and twenty of the Revised Statutes. This, however, has not been the interpretation of the law in the supreme court, or in any court, so far as we are advised. It is true that in the Flagstaff case,[1] and recently in the Amy-Silversmith case,[2] the supreme court declared that the side-lines of a location shall be end-lines whenever the lode on its strike crosses such lines; but these decisions do not affirm that all lines of a location crossed by a lode on its strike shall be end-lines. The most that can be deduced from them is, that opposite lines parallel to each other, when crossed by the lode, shall be end-lines. The case presented is not within the principle of these decisions. We have a lode extending on its strike on the general course of the location and within its side-lines a distance of ten hundred and seventy feet. It is conceded that the south end-line of the location is well placed, and all parts of the lode covered by the location are within the end-lines as fixed by the locator. The difficulty

1 98 U. S. 463, 25 L. ed. 253, 9 Morr. Min. Rep. 607.

2 152 U. S. 222, 14 Sup. Ct. Rep. 510, 38 L. ed. 419, 18 Morr. Min. Rep. 76.

arises from the circumstance that the location extends in a northerly direction, two hundred and eighty feet beyond the point where the lode diverges from the side-line. No reason is perceived for saying that this mistake in the length of the location should defeat the right to follow the vein on its dip outside of the location. It is said that we cannot make a new end-line at the point of divergence or elsewhere, because the court cannot make a new location, or in any way change that made by the parties. This, however, is not necessary. We can keep within the end-lines fixed by the locator, in respect to any extralateral right that may be recognized, without drawing any line, and if there be magic in the word "line," it will be better not to use it.[3]

In this instance, as in most controversies between adjacent owners, it is necessary to ascertain what part of the lode is within the New York location; and this, according to the map, appears to be ten hundred and seventy feet. At all points on the dip of the lode into the mountain westwardly, we can ascertain the length of the lode within the end-lines by measuring the same distance from the south end-line produced. In this proceeding, there is no departure from the end-lines of the New York location as fixed by the locator, and there is no new line of location drawn for any purpose whatever. We keep entirely within the end-lines of the location as required by the statute, and the circumstance that we are somewhat short of the north end-line, does not in any way affect the principle to be followed in construing the statute.

In deciding the application for injunction, Judge Hallett limited its operation to the segment of the vein lying south of the plane *r-z* parallel to the end-line plane *b-g-g'*.

[3] Quoted in Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 102 Am. St. Rep. 23, 72 Pac. 447, 450, 62 L. R. A. 555, 22 Morr. Min. Rep. 585.

This case does not appear to have been considered by any of the appellate courts, but subsequently a controversy arose between the owners of the Del Monte and the Last Chance claims wherein the extralateral rights of the Last Chance were determined substantially upon the same principles. The case, however, suggested other questions of large importance,—viz., the right of junior locators to place their lines over senior claims, and the definition of the extralateral rights as between the two conflicting lode claims, each covering the apex of the vein. The first of these other questions we have heretofore discussed.[4] The second one suggested is fully presented in a subsequent section.[5]

Subsequent to the decision of the supreme court of the United States in the Tyler-Last Chance litigation, the supreme court of Montana was afforded an opportunity of applying the doctrine originally announced by it in the King-Amy case to a controversy involving extralateral rights on a vein which crossed an end and a side line. The case of Fitzgerald v. Clark, which came before that court,[6] involved a contention between two lateral coterminous lode claims, —the Niagara and Black Rock,— as shown in the accompanying diagram (figure 75), reproduced from the one accompanying the opinion.

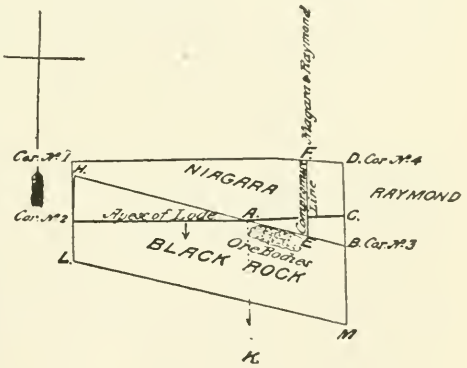


FIGURE 75.

4 *Ante*, §§ 363, 363a.

5 *Post*, § 597.

6 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273, 30 L. R. A. 803.

The Black Rock was the older of the two locations.[7]

The vein entered the west end-line of the Black Rock, pursued an easterly trend, crossing through the common side boundary at A, and thence through the east end-line of the Niagara, thus presenting a case where the vein on its course crossed an end and side line of each claim. As in King v. Amy & Silversmith Mining Co.,[8] Judge De Witt wrote the opinion of the court, and in doing so reviewed all the end-line cases which had been decided subsequent to the ruling in the Amy case. The same reasoning was applied to the solution of the Fitzgerald-Clark controversy as was invoked in the Amy case.

The court awarded an extralateral right to the Niagara, the junior claim, to the extent of the length of the apex within its surface lines, such right being defined by the extension of the east end-line boundary (D-B on figure 75) in the direction of the dip of the vein, and a plane parallel to it applied at A where the vein crossed the side-line common to the two claims. As a result the ownership of the ore bodies in dispute underlying the surface of the senior claim was adjudged to be in the junior claim. In other words, the right of the senior claim to the vein, both on the surface and in depth, ceased as against the junior claimant at the point where the apex passed out of the side line of the senior claim.

The Niagara-Black Rock case and the one between the Del Monte Mining and Milling Company and the Last Chance company involving the extralateral right on the Last Chance vein, shown on figure 74, *supra*, reached the supreme court of the United States and

[7] Opinion of supreme court of the United States in Clark v. Fitzgerald, 171 U. S. 92, 18 Sup. Ct. Rep. 941, 43 L. ed. 87.

[8] 9 Mont. 543, 24 Pac. 200, 16 Morr. Min. Rep. 38.

were considered together. In reaching its conclusions as to the problem under discussion the court cited and referred to the decisions which we have heretofore discussed and gave the doctrine therein announced its unqualified approval.[9]

As heretofore noted, we reserve for future discussion the decision of the supreme court of the United States in the Del Monte case, when we reach the subject of extralateral rights between claimants whose surface lines conflict.[10]

The only cases other than those heretofore cited where the question under immediate discussion was considered which have come under our observation are Parrot Silver and Copper Company v. Heinze,[11] where the rule was accepted, but only tentatively involved, and Ajax Gold Mining Company v. Hilkey,[12] where the doctrine was recognized.

§ 591a. Vein crossing one end-line, passing out of a side-line, then returning and ultimately passing out of either the other side or end line.—A situation illustrated on figure 76 was discussed by Judge Ross in the case of Waterloo Mining Co. v. Doe,[13] wherein he said:—

> The grant is to lodes having their apex in the ground patented. The fact that a part of the apex might be in the ground granted would not give any right to any part of the vein the apex of which was

[9] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; Clark v. Fitzgerald, 171 U. S. 92, 18 Sup. Ct. Rep. 941, 43 L. ed. 87.

[10] *Post*, § 596.

[11] 25 Mont. 139, 87 Am. St. Rep. 386, 64 Pac. 326, 328, 53 L. R. A. 491, 21 Morr. Min. Rep. 232.

[12] 31 Colo. 131, 102 Am. St. Rep. 23, 72 Pac. 447, 449, 62 L. R. A. 555, 22 Morr. Min. Rep. 585.

[13] 82 Fed. 45, 55, 27 C. C. A. 50, 19 Morr. Min. Rep. 1.

not therein, although the apex might be cut by both end-lines of the granted premises.

Undoubtedly, in the case assumed and illustrated on the figure 76, applying the principle announced in the preceding section, the locator would have extralateral rights between the planes *a-d-v* and *y-w* and between the planes *b-c-o* and *x-n*.

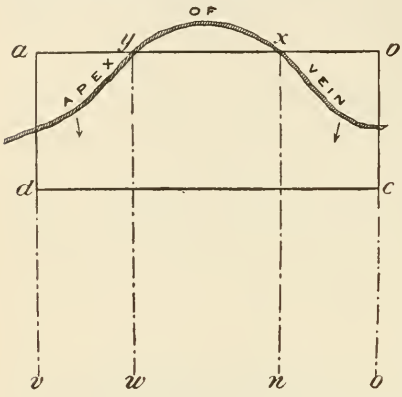


FIGURE 76.

If the portion of the apex *x-y* were within public land it might be appropriated by a junior locator in such a way as would confer an extralateral right, which might be exercised by following the vein underneath the senior location. In other words, the apex *x-y* and the underground parts of the vein lying between the vertical planes *y-w* and *x-n* do not necessarily pass under this assumption to the senior locator. If, however, we may assume that the portion of the apex *x-y* is within a tract of land patented under the placer, townsite, railroad, agricultural, or any laws under which rights are confined to vertical boundaries, we have an opportunity to test the value of the suggestion discussed in a previous section.[14]

The views of the secretary of the interior quoted and commented on in that section, if they can be accepted as establishing the doctrine of "theoretical

[14] § 312a.

apex," applied to the case now assumed, would result in the conclusion that, as a matter of law, the location shown on figure 76 contained the apex for the entire length of the claim, conferring an extralateral right between the end-line planes *a-d-v* and *b-c-o*. In other words, to paraphrase the opinion of the secretary of the interior in the Mabel Lode case,[15] for the purpose of discovery and purchase under the mining laws, the legal apex of the vein from *x* to *y* on figure 76, dipping out of the ground disposed of under laws limiting rights to the common-law attributes of ownership within vertical planes, is that portion of the vein within the location as shown on the figure which would constitute the actual apex if the vein had no actual existence in the ground previously disposed of. In other words, as to this segment of the vein *x-y* the legal apex is along the line of intersection of the vertical bounding plane of the previously patented tract with the plane of the vein underneath the surface.

Of course, the location of the claim under the conditions presently assumed would carry everything within its vertical boundaries. The only question remaining is whether that segment of the vein between the planes *y-w* and *x-n* could be followed on the downward course outside of and beyond the vertical side-line plane *d-c*. What view the courts may ultimately take with reference to extralateral rights under the conditions we have assumed cannot be foretold with any degree of certainty, and our own opinion, if we had formed one, is of no serious moment.

[15] Woods v. Holden, 26 L. D. 198; S. C., on review, 27 L. D. 375.

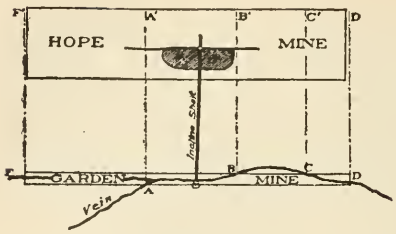


FIGURE 77.

In figure 77 we present an illustration of an east-and-west vein dipping north from the Garden into the Hope, a case which was considered in one of the trial courts in Colorado. The apex of the vein enters the claim across the eastern end-line at D, passes out of the side-line at C, re-enters the same line at B, forks at A, one branch passing out of the south side-line, the other passing out of the west end-line at F. The controversy arose over the ore bodies on the vein underneath the Hope surface. They were awarded to the Garden mine, the extralateral right being predicated on the portion of the apex A-B within the boundaries of the Garden.[16]

This case presents no serious difficulty, and in most of its aspects is similar to the hypothetical case illustrated on figure 76. The application of the rules governing the definition of the extralateral right in cases where the vein passes through an end-line and a side-line would give to the Garden main vein, F-D, the underground segments between the planes F-F′ and B-B′, and C-C′ and D-D′. No extralateral right could be predicated on that part of the apex B-C outside of the location, as that part is not covered by the location, and there is no opportunity of applying to this segment the doctrine of "theoretical apex," as the vein does not dip underneath the Garden surface, but in the opposite direction. As to the branch vein A, the bounding plane A-A′ results from the principle

[16] Sims v. Garden M. & M. Co. (unreported), tried before Judge A. H. De France, an experienced mining judge and formerly member of the Colorado supreme court commission.

that this same set of end-line planes bound the extra-lateral right as to all veins—a principle discussed in a subsequent section.[17]

The supreme court of California approves the rule as applied in the Garden case.[18]

§ 592. **Vein with apex wholly within the location, but crossing none of its boundaries, or entering at one end-line and not reaching any other boundary.**—After reading the opinions of the supreme court of the United States and of Judges De Witt, Hawley, and Hallett, in the side-end-line cases reviewed in the previous section, it is hardly necessary to consider under a separate classification the case of a vein having its apex wholly within the location, but crossing none of its boundaries, as illustrated in figure 78, or that of one crossing an end-line and failing to reach any other boundary, as illustrated in figure 79.

We are not aware of any adjudicated case such as is illustrated by figure 78. Such an instance was assumed for the purpose of argument by Judge Hallett in the Del Monte case,[19] wherein that judge was inclined to ridicule the idea that anyone would deny the right of the locator to follow the lode within his end-lines, upon the ground that the lode did not reach either of such lines.

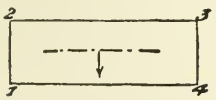


FIGURE 78.

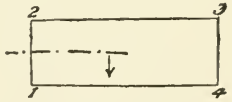


FIGURE 79.

[17] *Post*, § 593.

[18] McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823, 826.

[19] Del Monte M. & M. Co. v. New York & L. C. M. Co., 66 Fed. 212, 215.

It would be exceedingly difficult to understand upon what theory the extralateral right could be denied in either this case or that illustrated in figure 79.

An instance of the latter class occurred in the suit of the Carson City Gold and Silver Mining Co. v. North Star Mining Co., tried before Judge J. H. Beatty, sitting as circuit judge in the ninth circuit.[20]

We have presented, on page 721, a diagram (figure 25) illustrative of this case. It was demonstrated that the course of the vein through the location in the direction of the west end-line was interrupted by what was locally termed a "crossing," beyond which the fissure did not extend. No ore bodies were encountered west of this crossing. The court found that the apex of the vein ended at the point C, under the mill, and applied at this point an end-line plane parallel to the east end-line, invoking the doctrine of the Tyler-Last Chance case, on the theory that the east end-line was crossed by the lode. The practical result, so far as the North Star was concerned, would have been the same if the court had extended the west end-line, as there was no segment of the vein lying between a plane drawn through that line and one applied by the court at the point C.

A similar case was assumed for illustrative purposes by Judge Hawley, in his decision in Tyler Mining Co. v. Sweeney.[21] It was there said that there certainly could be no question in such a case as to the right of the locator to follow the lode in its downward course for its entire depth.

In Wakeman v. Norton[22] the supreme court of Colo-

20 73 Fed. 597; affirmed on writ of error from circuit court of appeals, 83 Fed. 658, 28 C. C. A. 333, 19 Morr. Min. Rep. 118; *certiorari* denied, 171 U. S. 687, 18 Sup. Ct. Rep. 940.

21 54 Fed. 284, 293, 4 C. C. A. 329.

22 24 Colo. 192, 49 Pac. 283, 286.

rado considered a case of this character, and in its decision thus states its views:—

> In instructing the jury that, in order to give any extralateral rights, it was essential that the apex or top of a vein should on its course pass through both end-lines of a claim, the court imposed a condition that has not heretofore been announced as an essential to the exercise of such right in any of the adjudicated cases.

The supreme court of the United States, in its opinion in the Del Monte case, cited with approval the cases of Carson City G. & S. M. Co. v. North Star M. Co., and Wakeman v. Norton, and took occasion to express its views *arguendo* as follows:—

> The law places a limit on the length of the vein beyond which he may not go, but it does not say that he shall not go outside the vertical side-lines unless the vein in its course reaches the end-lines. Nowhere is it said that he must have a vein which either on or below the surface extends from end-line to end-line in order to pursue that vein on its dip outside the vertical side-lines. Naming limits beyond which a grant does not go is not equivalent to saying that nothing is granted which does not extend to those limits. The locator is given a right to pursue any vein whose apex is within his surface limits, on its dip outside the vertical side-lines, but may not in such pursuit go beyond the vertical end-lines. And this is all the statute provides. Suppose a vein enters at an end-line but terminates halfway across the length of the location, his right to follow that vein on its dip beyond the vertical side-lines is as plainly given by the statute as though in its course it had extended to the farther end-line. It is a vein the top or apex of which lies inside of such surface lines extended downward vertically.[23]

[23] Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 90, 91, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

In the case of Work Min. & Mill. Co. v. Doctor Jack Pot M. Co.,[24] the circuit court of appeals, eighth circuit, said:—

> It does not follow that to secure extralateral rights the vein must extend from end-line to end-line, or, for that matter, intersect either end-line.

The supreme court of Nevada expresses similar views.[25]

The excerpt quoted above from the decision of the supreme court of the United States in the Del Monte case is a clear enunciation of a wholesome principle which prevents the "frittering away by construction" of the most valuable right granted by the mining laws, and prescribes a rational rule, the application of which will result in a common-sense solution of many of the problems encountered in the administration of those laws.

§ 593. Extralateral right as to veins other than the one upon which the location is based.—While the framework of the statute with reference to the discovery and location of veins or lodes is unquestionably constructed in the original instance on the central idea of a single vein, the appropriation of which is to be accomplished by constructing end-lines across its course defining the length on the vein and the planes within which it may be followed in depth, with side-lines parallel to such course, the law contemplates that there may be found veins having their tops, or apices, within the boundaries of the location other than the one originally discovered and upon which the location is primarily predicated. Such instances are by no

[24] 194 Fed. 620, 629.

[25] Southern Nevada Gold & Silver M. Co. v. Holmes Min. Co., 27 Nev. 107, 103 Am. St. Rep. 759, 73 Pac. 759, 761.

means rare. Sometimes these veins, which for the purpose of identification we may call secondary veins, are parallel to the located vein, in which case there is little room for controversy as to the bounding planes which define the extralateral right. Sometimes, however, they are crosswise of the original vein, and exhibit what we may call, comparatively speaking, erratic tendencies. The difficulties surrounding the application of the law to locations made under the act of 1866, many of which were irregular in form, are greater than in the case of the more symmetrical locations required under the existing law. While under the act of 1866 there was granted but the one lode, the act of 1872 enlarged the grant by conferring upon the owners of the prior locations all lodes which had their tops, or apices, within the boundaries of the location. The most satisfactory way of ascertaining the present state of the law on the subject of the extralateral-right planes to be applied to these secondary veins is to trace its development from the earlier cases to the last judicial expression. While there may be no uncertainty as to the abstract rule ultimately announced, it is sometimes difficult to apply it without producing results which either challenge the wisdom of the rule (which, of course, is no warrant for its nonobservance) or involve apparent inconsistencies or absurdities.

In the case of Iron Silver Mining Company v. Elgin Mining etc. Company, we find the following statement by the supreme court of the United States:—

> It often happens that the top, or apex, of more than one vein lies within such surface lines, and the veins may have different courses and dips, yet his right to follow them outside of the side-lines of the location must be bounded by planes drawn vertically through the same end-lines. The planes of the end-

lines cannot be drawn at a right angle to the courses of all the veins if they are not identical.[26]

This was not said in response to any issue raised in the case, but it was presented as an argument against the contention adopted in the dissenting opinion of Chief Justice Waite, that bounding planes on a vein within a location having nonparallel end-lines should be defined by lines drawn crosswise of the vein—*e. g.*, at right angles—at the extreme points where the apex leaves the location.

The first case in which the question was to any extent actually involved and passed upon was considered by Judge Hawley sitting as circuit judge for the ninth circuit. We refer to Consolidated Wyoming M. Co. v. Champion M. Co.,[27] the facts of which are illustrated on figure 80.

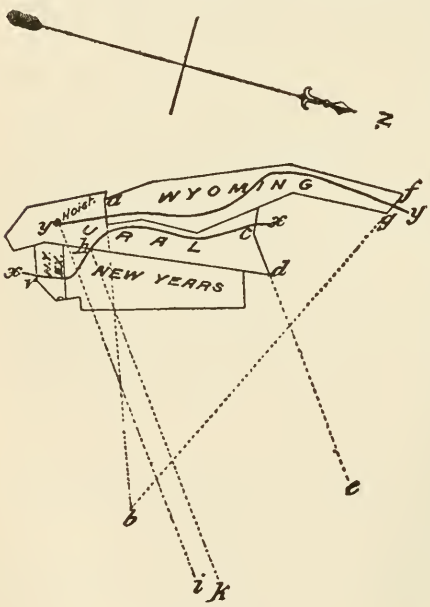


FIGURE 80.

The Consolidated Wyoming company owned the Wyoming and Ural claims, the Champion company the New Year's and New Year's Extension. Both the Wyoming and Ural were located under the act of 1866, but patented under the later law. The others were located under the act of 1872. Both the

[26] 118 U. S. 196, 207, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98, 15 Morr. Min. Rep. 641.

[27] 63 Fed. 540, 18 Morr. Min. Rep. 113.

Ural and Wyoming had irregularly shaped surfaces so common to locations made under the act of 1866.

The original location of the Ural was based on the Ural lode *x-x*, the only one subject to appropriation by a single location under the first mining act. It was called the "contact vein," as it was found between a granite hanging and a slate foot wall. The Wyoming vein *y-y* was entirely within the slate, and descended into the earth at a lesser angle than the Ural, resulting in a union of the two veins on the dip underneath the surface of the New Year's, and the controversy was as to the extralateral right in the vein below the line of junction. The court defined the extralateral right of the Consolidated Wyoming company on the Wyoming or slate vein within the Wyoming patented lines, by prolonging the converging end-lines resulting in the triangular segment *a-b-g-f*.[28] As to the Ural vein, it awarded that segment lying between the planes *c-d-e* and *h-k*.[29]

The slate vein, passing out of the Wyoming south

[28] We have heretofore (§ 574) discussed this case when dealing with the subject of converging end-lines of claims located under the act of 1866, and have also referred to the suggestion of Mr. Morrison and Mr. Costigan that, if the rectangular theory of extralateral rights under the act of 1866 was properly applied to cases of diverging end-lines, the same rule should be applied to cases similar to that shown on figure 80 (*ante*, § 577a).

[29] The construction of the plane *h-k* parallel to the line *c-d* at the point where the vein crossed the Ural east side-line is not altogether logical, as the apex of the vein did not cross the line *c-d*. The supreme court of Colorado has otherwise criticised this case, holding it to be in conflict with the case of King v. Amy & Silversmith etc. M. Co., 152 U. S. 222, 14 Sup. Ct. Rep. 510, 38 L. ed. 419, 18 Morr. Min. Rep. 76. See Catron v. Old, 23 Colo. 433, 58 Am. St. Rep. 256, 48 Pac. 687, 689, 18 Morr. Min. Rep. 569. In a subsequent case, however, the court explained and limited this criticism, and, as we shall hereafter note, followed the reasoning of Judge Hawley, and applied the principle to a secondary vein within a location made under the act of 1872. Ajax Gold Min. Co. v. Hilkey, 31 Colo. 131, 102 Am. St. Rep. 23, 72 Pac. 447, 449, 62 L. R. A. 555, 22 Morr. Min. Rep. 585.

end-line, entered the Ural and continued to the south as far as the point marked "hoist" on the diagram. This part of the Wyoming vein within the Ural ground constituted the "secondary vein" in that location. In defining the extralateral right on this vein the court applied a plane parallel to the one fixed by it on the Ural—i. e., the plane *y-i*, parallel to the plane *h-k*.[30]

No reference is made in the decision to the statement of the supreme court of the United States in the Elgin case, heretofore quoted.[31]

The case of Walrath v. Champion M. Co. (commonly called the Providence-Champion case[32]) was tried and decided by the same judge at the same time as the

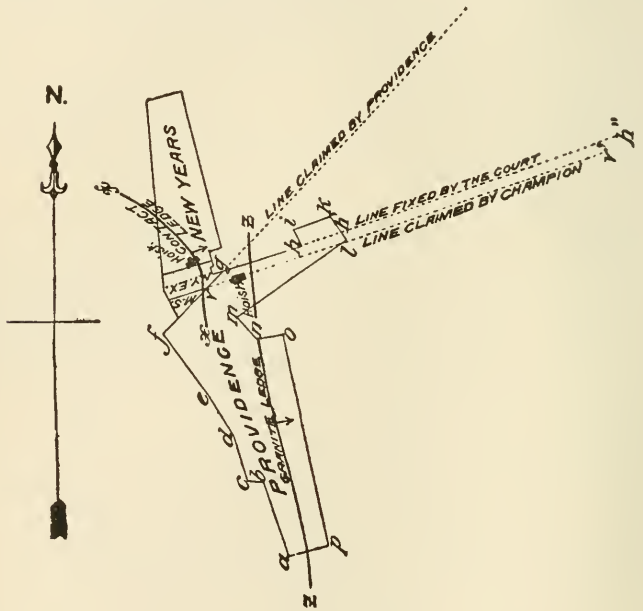


FIGURE 81.

[30] 63 Fed. 550, 18 Morr. Min. Rep. 113.

[31] An appeal was perfected in this case, but it was compromised and the appeal dismissed.

[32] 63 Fed. 552, 18 Morr. Min. Rep. 113.

Wyoming-Champion case, the facts of which may be illustrated by reference to figure 81.

This case presented an instance of a patent issued under the act of 1866 for an irregular surface, with parallel end-lines crossing the original lode, and a subsequently discovered or "secondary" vein, which crossed neither end-line. The original lode is marked *z-z* on the figure, and is locally known as the granite ledge, lying wholly within a granite formation. It crossed two parallel end-lines, *a-p* and *g-h*.

Some years after the passage of the act of 1872, another ledge or vein, called the contact ledge, *x-x*, was found to enter the Providence ground across the line *f-g*, pursuing a southerly course, but it is not shown to have reached on such course any of the other boundaries.[33] The Champion company, having subsequent to 1872 located that portion of the contact ledge lying within the New Year's and New Year's Extension, a controversy arose as to the bounding plane between the two companies on this ledge. There was no controversy between the litigating parties as to the original, or granite, ledge. The Providence contended, that as the contact ledge crossed the line *f-g*, that line became in law an end-line, and the vertical bounding plane should be drawn through the line *f-g*, produced indefinitely.

The Champion contended that the rights of the Providence on all ledges having their apices within its boundaries must be fixed with regard to the end-lines of its *location* and the general direction of such lines, as described in the patent and delineated upon the map accompanying it; that the only lines appearing upon the plat which at all fulfilled the natural or legal defi-

[33] This is the same ledge which was partially involved in the Wyoming case, known there as the Ural or contact vein.

nitions of end-lines were the end-lines crossed by the nitions of end-lines were the end-lines crossed by the original lode, *z-z*—to wit, *g-h* and *a-p*—and that they must be construed to be the "end-lines of the location" referred to in the act of 1872; that the rule enunciated by the circuit court of appeals in Tyler v. Sweeney,[34] sanctioning the application of a plane parallel to the end-line at the point where the vein passed out of a side-line (a rule subsequently approved in the Del Monte case),[35] was applicable to the case, and afforded the only consistent legal solution of the controversy between the parties. This rule would apply the plane parallel to *g-h*, at the point *v*, where the ledge in controversy crossed on its southward course the boundary line, *f-g*, giving the bounding plane, *v-v'*.

The court declined to adopt either theory. It announced the following as its views:—

> The act of 1872, in granting all other veins that were within the surface lines of previous locations, did not create any new lines for such other veins, nor invest the court with any authority to make new end-lines for such other veins. And it is apparent from an examination of the statute that the court has no power to make a new location for every vein that may be found within the surface lines of the location, and thereby enlarge the rights of the original locators. When the end-lines of a mining location are once fixed, they bound the extralateral rights to all the lodes that are thereafter found within the surface lines of the location. It necessarily follows, that the end-lines of the Providence survey must be considered by the court as the end-lines of any and all other lodes or veins which lie "inside of such surface lines"; otherwise, endless confusion would arise in the construction of the statute. End-lines would have to be constructed

[34] 54 Fed. 284, 4 C. C. A. 329.

[35] *Ante*, § 591.

in different directions if the separate lodes or veins found within the surface lines did not run parallel with each other, and the result would be that these lines extended might give to the owners of the claims a greater length along the lode, as it extended downward, than they had upon the surface. If the same end-lines which bind the extralateral rights of the Providence surface survey apply to the contact vein, and to all other veins, if any are hereafter found, then no such difficulty can arise. This is the rule that applies to all locations made after the act of 1872, and it ought not to be presumed that congress, by its grant to prior locators, intended to give greater rights to them than were given and granted to subsequent locators under the same act.[36]

The court cited and relied upon the statement of the supreme court of the United States in the Elgin case, heretofore quoted.

The practical result of the court's decision was to give to the Providence all of the vein south of the vertical boundaries *f-g* and *g-h*, and defining its extralateral right by a plane, *g-h*, produced in the direction of the dip of the vein—i. e., the plane *g-h-h'* marked on figure 81, "Line fixed by the court."

When the case reached the circuit court of appeals that court construed the decision of Judge Hawley as defining an *extralateral right* through the side-line *f-g* and the end-line *g-h*. The appellate court directed a modification of the judgment, the extent of which may be best understood by quoting from the opinion. Said the appellate court (italics are ours):—

In so far as the decree appealed from limits the *extralateral right* of the complainant to follow the vein called in the record the "back" or "contact" vein in its downward course by the line *f-g* running south

[36] Walrath v. Champion M. Co., 63 Fed. 552, 557, 18 Morr. Min. Rep. 113.

forty-three degrees west, extending vertically downward, it is erroneous, and should be modified. The court below correctly found and adjudged the end-lines of the Providence claim, under which complainant claims, to be the lines *a-p* and *g-h;* and further, that they are the true and only end-lines of each and every vein, lode, or ledge found within the surface location of the Providence claim. . . . . In no case is the extralateral right of a first locator in respect to a vein, lode, or ledge having its top or apex within the lines of his surface location bounded by any side-line of the surface location extended downward or otherwise. To the extent, therefore, that the extralateral right of the complainant to the back or contact ledge here in controversy was bounded by the court below by the side-line *f-g*, running south forty-three degrees west, extended vertically downward, it is erroneous. It should be bounded by vertical planes drawn downward through the end-line *g-h*, running south seventy-three degrees west, and *through the end-line a-p*, extended indefinitely in their own direction, *subject to the condition that the complainant has no right to enter upon the surface of the respondent's claims.*[37]

This solution of the problem is not altogether clear or free from ambiguity. The appellate court was evidently desirous of making it plain that the line *f-g* could not be considered as an *extralateral-right* line, and in this regard there is no element of uncertainty. If we construe the opinion of the court with sole regard to the direction given to the line *g-h*, south seventy-three west, the direction of the dip, it would seem that the line was not to be operative on the reverse course north seventy-three degrees east. But the subsequent clause, italicized above, "*subject to the conditions that the complainant has no right to enter upon the surface of the respondent's claims,*" leads to the

[37] 72 Fed. 978, 980, 19 C. C. A. 323.

inference, more or less plausible, that the court intended the line *g-h* to be extended in *both* directions,—south seventy-three degrees west, in the direction of the dip, and north seventy-three degrees east, so as to take in a part of the apex lying outside of the Providence and within the New Year's and New Year's Extension claims, as this was the only *surface* belonging to respondents to which the court could have made any possible reference.

The court went further and fixed the end-line plane *a-p* at the south end of the claim as the southern bounding plane on the *contact* ledge, whereas the proof showed quite clearly that that ledge, if it continued at all in a southerly direction, would in all probability have crossed the side-line *e-f*.

If the court intended to authorize the projection of the north bounding plane *g-h* on the reverse course, north seventy-three degrees east, the line *t-g* on figure 82 (*post*), it necessarily contemplated the same result as to the line *a-p*, and thus to include within these end-line planes something like thirty-one hundred feet on a vein with only a few hundred feet of apex, projecting end-line planes over the apex in other claims whose surfaces did not conflict with the Providence, or, to state the doctrine in a more condensed form,—if the apex of a secondary vein is found *to any extent* in a location, the owner of the claim takes all parts of such vein underground which are embraced within the end-line planes extended in both directions through the end-lines on the original lode. That the decision of the court is susceptible of this construction is pointed out by the supreme court of Colorado in Jefferson M. Co. v. Anchoria-Leland M. Co.[38] Such construction, however,

[38] 32 Colo. 176, 75 Pac. 1070, 1075, 64 L. R. A. 925; Ajax M. Co. v. Hilkey, 31 Colo. 131, 102 Am. St. Rep. 23, 72 Pac. 447, 62 L. R. A. 555, 22 Morr. Min. Rep. 585.

we think, is clearly negatived if we give heed to the principle applied by the supreme court of the United States, affirming the decision of the supreme court of Montana in the Niagara-Black Rock case.[39] The suggested application of this doctrine, with its possible attendant results, will be noted when we take up for consideration in logical order a later case passed upon by the same court. However, we are quite satisfied that this result was neither intended nor contemplated by the court.

An appeal was taken from the judgment of the circuit court of appeals to the supreme court of the United States by the Providence owners.[40]

[39] Clark v. Fitzgerald, 171 U. S. 92, 18 Sup. Ct. Rep. 941, 43 L. ed. 87; Fitzgerald v. Clark, 17 Mont. 150, 52 Am. St. Rep. 665, 42 Pac. 273, 277, 30 L. R. A. 803.

[40] No cross-appeal was taken by the Champion company to either of the appellate courts, for economic reasons. All of the vein within the New Year's and New Year's Extension claims north of the plane *f-g* had been worked out years before the litigation arose. There was nothing of value there to justify litigation. The narrow strip of ground between the plane claimed by the Champion, *v-v'*, and the one fixed by the court, *g-h-h'*, did not embrace the ore "shoot," and was practically valueless. The valuable ore bodies over which the litigation arose, and which alone engaged the attention of either courts or litigants, were within the triangle formed by the line *g-h-h'*, and the one claimed by the Providence, *f-g-g'*. The only object to be gained by prosecuting a cross-appeal would have been to secure the establishment of a principle to be followed in other cases. However, the Champion company stated its original position fully in both appellate courts, and it was urged as a reason for the affirmance of the judgment of the trial court that the decree had awarded the Providence more than it was legally entitled to, and therefore they had no reason to complain. It has been said by a writer commenting on this case ("A Problem in Mining Law," Harvard Law Review, Dec., 1902, vol. xvi, No. 2), that the trial court probably refused to grant the contention of the Champion company—the line *v-v'*—by reason of its "apparent injustice." "If that line [says the writer] had been affirmed by the decision, the Champion company would have taken, perhaps, not only a portion of the Providence shaft, but also the greater part of its

On this appeal the counsel for the Providence in their briefs presented a diagram for the purposes of illustration, which we herewith reproduce as figure 82,

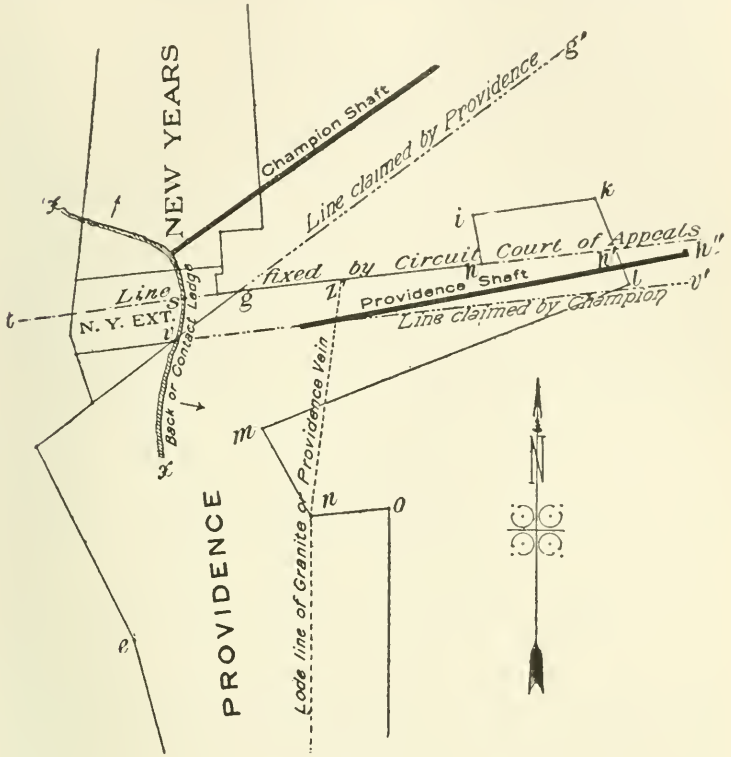


FIGURE 82.

upon which was delineated the line *t-g-h* marked "Line fixed by the circuit court of appeals." In other

underground workings. In an attempt to avoid such a result, the courts made, it is suggested with deference, an erroneous ruling."

We do not feel called upon to defend the courts from the charge that, in deciding the case, they considered the hardship or inconvenience to one party or the other which might flow from a given decision, instead of confining themselves to an interpretation of the statute. But some reason other than the one above assigned will have to be presented, in view of the fact that the Providence shaft and almost

words, the Providence thus interpreted the decision of the appellate court. The counsel for the Champion company, although no cross-appeal had been taken, contended that the trial court never intended to fix the line *f-g* as an extralateral-right line. It was established as a vertical bounding plane for the purpose of determining the intralimital rights of the Providence on the ledge, and this without serious regard for the extralateral right of the Champion on the Ural or contact vein, which, applying the principle of the Niagara-Black Rock case, was entitled to be considered. The line *f-g* never was given any operative effect by the trial court beyond the point *g*. To have been given such effect it should have been extended in the direction claimed by the Providence, which contention was rejected. Extralateral lines, or, more correctly speaking, *planes,* are those which cut or intersect *outside parts of the vein*, such an underground segment as is outside of a vertical plane drawn through a surface

all of its workings were not on the contact vein, but on the *granite vein,* five hundred feet to the east. The back or contact vein had been reached from the Providence workings by means of a long crosscut through country rock, and none of these workings on the contact vein driven from the crosscut by the Providence were within the ground claimed by the Champion. As counsel for the Champion company, the author feels convinced that if that company had presented a cross-appeal, the court of last resort would have been compelled to apply at *v* a plane parallel to the Providence end-line *g-h*—"the line claimed by the Champion." We think that with the exception of one decision of the supreme court of Colorado, which laid stress on the opinion in the Providence-Champion case, notwithstanding the foregoing explanation of the author (Jefferson M. Co. v. Anchoria-Leland, M. & M. Co., 32 Colo. 176, 76 Pac. 1070, 16 L. R. A. 925), the modern tendency of decision is to apply to all secondary veins at the points of departure planes parallel to the end-lines controlling extralateral rights on the original vein. The development of the subject is shown in the text which follows.

side-line. The line *f-g* stopping at *g*, under the decree of the trial court, did not cut any "outside" parts of the vein, and was in no sense an extralateral-right line. This diagram, appearing in the brief of counsel for the Providence, was utilized by the supreme court of the United States to illustrate the facts of the case; but its attention was not called to the effect of the westerly extension of the line, marked on the diagram "Line fixed by the circuit court of appeals," nor does it discuss it in its opinion. There were nine assignments of error. The first eight attacked so much of the decree as established the line *g-h* as an end-line for the purpose of determining the extralateral right, or failed to establish the line *f-g*, and that line produced indefinitely in the direction of *g'* as such end-line The last two assailed so much of the decree as awarded to the Champion company the right to pursue the vein on its downward course underneath the parallelogram *h-i-k-h'* north of the end-line plane *g-h*. The controversy thus limited did not necessarily involve the consideration of anything north of the line *f-g*.

The judgment of the circuit court of appeals was affirmed, the supreme court of the United States placing the stress of its opinion upon the confirmation of that portion of the decision of both trial and appellate courts which denied that the line *f-g* performed the function of an end-line defining an extralateral right. As there was no cross-appeal, and this conclusion having been reached, the judgment was necessarily affirmed.[41]

[41] Walrath v. Champion M. Co., 171 U. S. 293, 18 Sup. Ct. Rep. 909, 43 L. ed. 170, 19 Morr. Min. Rep. 410.

It is quite apparent that the modification of the order directed by the circuit court of appeals was made out of abundant caution to avoid the possibility of the decree being interpreted as sanctioning the line *f-g* as an end-line defining an *extralateral* right. Its force as defining an *intralimital* right was accepted by the Champion by failing to take a cross-appeal. We are quite convinced that counsel for the Providence placed an erroneous interpretation on the decision of the circuit court of appeals in placing the line *t-g-h-h'* on its diagram, and that there is nothing in the decisions of either appellate courts, construed in the light of the facts and contentions of the respective parties, which on final analysis justifies the assertion that it was ever intended that end-line planes should be extended backward in the direction of the upward course of the vein beyond surface limits so as to embrace a part of the apex of the vein found in another location. Such an interpretation would be in direct antagonism to the doctrine announced in the Del Monte case, decided at the same term, and referred to in the opinion in Walrath v. Champion M. Co.,[42] as well as being opposed to numerous previous decisions of that court on cognate subjects.

We have explained in a previous note the reason why no cross-appeal was taken by the Champion company.[43] We shall have occasion to recur to the deci-

[42] 171 U. S. 307, 18 Sup. Ct. Rep. 909, 43 L. ed. 176, 19 Morr. Min. Rep. 410.

[43] We have devoted so much space to the discussion of this case for two reasons: the importance of the subject considered, and the fact that no case with which the author has ever been connected has caused so much comment at the bar. We have been repeatedly called upon to supply the briefs used in the case, answer inquiries, and make

sion in the Walrath-Champion case in presenting the more modern cases. As an ultimate conclusion to be deduced from a consideration of the later development of the law we deferentially submit that the case was erroneously decided in the trial court. No cross-appeal having been taken, we are not at liberty to criticise the appellate courts in not correcting what appears to us to be a mistake of the trial court.

§ 594. Other illustrations of the application of the principles discussed.—A controversy arose in Montana between the St. Louis Mining and Milling Company, owning the St. Louis claim, and the Montana Mining Company, owning the Nine Hour, which involved the consideration of the extralateral rights of the former company on what we call a secondary vein. The case came before the circuit court of appeals on cross-appeals, which are separately reported,[44] both of which opinions are to be consulted in analyzing the case and arriving at an understanding of that branch now under consideration.

We have heretofore discussed this case when dealing with the subject of the extralateral right on a vein entering and passing out of the same side-line, and have

explanations as to the effect of this decision. The effect claimed for it by some members of the bar is appalling. Perhaps the explanation here given may be of some use in determining the value of the case as a precedent.

[44] Montana M. Co., Ltd., v. St. Louis M. & M. Co., 102 Fed. 430, 42 C. C. A. 415, 20 Morr. Min. Rep. 507; St. Louis M. & M. Co. v. Montana M. Co., 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725, 21 Morr. Min. Rep. 57.

there given an illustration (figure 65),[45] which we herewith reproduce for the purpose of convenience. The circuit court of appeals defined the boundary

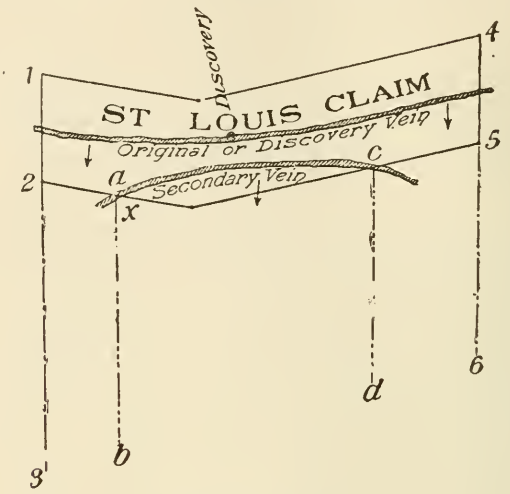


FIGURE 65.

planes on the secondary vein by establishing planes parallel to the end-lines at the points on the side-line where the vein entered and departed, resulting in the planes *a-b* and *c-d*, citing as authority for this method of determining the extralateral rights the cases of Iron Silver Mining Co. v. Elgin M. & S. Co.,[46] and Walrath v. Champion M. Co., heretofore discussed.[47]

This solution of the problem seems to be the only possible one in the light of these decisions of the supreme court of the United States. It has been said, however, that the rule announced by the circuit court

[45] *Ante*, § 584.

[46] 118 U. S. 196, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98, 15 Morr. Min. Rep. 641.

[47] 171 U. S. 293, 18 Sup. Ct. Rep. 909, 43 L. ed. 170, 19 Morr. Min. Rep. 410.

of appeals in the Walrath-Champion case, affirmed by the supreme court of the United States, applied to the facts of the St. Louis-Montana case, would give to the St. Louis company all that segment of the secondary vein lying within the extended end-line planes on the original lode—that is the planes *1-2-3* and *4-5-6*—notwithstanding the fact that the apex only extends in that claim from A to C.[48]

In the preceding section we have fully explained what we understand to be the proper interpretation of the decision of the circuit court of appeals in the Walrath case, from which it appears that no such deduction as claimed can be made. The fact that the same court in the St. Louis case did not apply any such doctrine as that above suggested is a circumstance of the highest corroborative value supporting our view that the decision in the Walrath case was never intended to sanction any such doctrine. If it had, it would have followed it, and it would have been in duty bound to do so, as it had received the approval of the supreme court of the United States. As it is, the court of appeals cites the Walrath case as authority for its decision in the St. Louis case.

In the final decision rendered by the circuit court of appeals in this litigation the court asserts that the extralateral right on this secondary vein as there defined has been approved by the supreme court of the United States.[49]

[48] "A Problem in Mining Law," Harvard Law Review, Dec., 1902, wherein the writer says: "It may have been an oversight on the part of the attorneys for the St. Louis that they did not cite the Walrath case and did not claim any more than the court gave them. But that would not justify the court in disregarding a principle which it had expressly held to be controlling."

[49] Montana M. Co. v. St. Louis M. & M. Co., 183 Fed. 51, 61, 105 C. C. A. 343.

Several interesting cases have arisen in Colorado since the decision in the Walrath-Champion case, which involve the question here discussed. The first of these in chronological order is the case of Ajax Gold Mining Co. v. Hilkey,[50] the facts of which are illustrated by a diagram accompanying the opinion of the court, which we herewith reproduce as figure 82A.

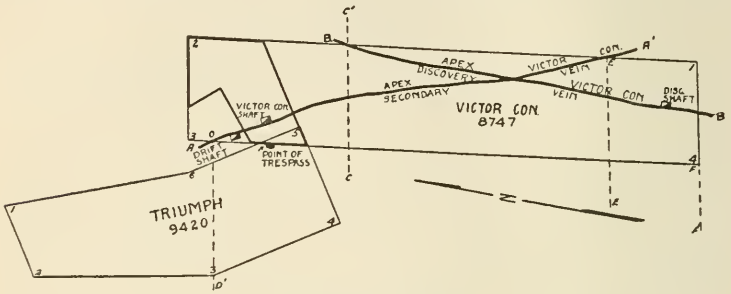


FIGURE 82A.

The Ajax company owned the Victor Consolidated claim. The discovery vein B-B′ crossed the southerly end line and proceeding in a northerly direction passed out of the east side-line. The secondary vein A-A′ passed diagonally through the claim crossing both side-lines. The defendant Hilkey owned the Triumph adjoining the Victor on the west. The secondary vein in the Victor on its downward course entered underneath the surface of the Triumph, and the controversy was over the ore bodies underneath the surface of this claim. The Ajax company claimed that its extralateral right in the secondary vein was to be defined by the application of the plane D-D′ parallel to the end-line on the original vein 1-4 at the point where the vein crossed the west side-line of the Victor. The Triumph owner contended that as the extralateral right on the original

[50] 31 Colo. 131, 102 Am. St. Rep. 23, 72 Pac. 447, 22 Morr. Min. Rep. 585, 62 L. R. A. 555.

lode was to be defined and limited by the plane C-C′ drawn through the point where the discovery vein passed out of the east side-line—the plane being parallel to the south end-line—that no extralateral right in the secondary vein could extend northerly beyond the plane C-C.′

The court upheld the contention of the Ajax company applying the plane D-D′. In rendering its decision it said in part:—

> In the Walrath case, which was twice before the circuit court of appeals [51] (63 Fed. 552, 19 C. C. A. 323, 72 Fed. 978) and once before the supreme court of the United States, there are some expressions in the opinions of the circuit court of appeals from which, taken alone, it might be inferred that under facts like those here present the owner of a claim would have extralateral rights in the discovery vein even beyond the point where, on its strike, it leaves the side-line; and that the bounding planes, within which such rights are to be exercised, must be drawn through the two end-lines. But appellant makes no such contention here, and is content with extralateral rights in the discovery vein only up to the point of its departure from the east side-line, so that for our present argument we assume that to be the true doctrine.[52]

After placing the responsibility for the rule applied by it upon the concession of counsel, who declined to claim more of the vein than the application of this rule would award to his clients, the court proceeds to enunciate principles which clearly demonstrate that it

[51] This is a mistake. The opinion in 63 Fed. 552, 18 Morr. Min. Rep. 113, is that of the trial court. The circuit court of appeals handed down only one opinion—72 Fed. 978, 19 C. C. A. 323.

[52] 72 Pac. 449.

was the only rule which could possibly be applied without violating some of the cardinal principles established by the courts of last resort. We quote further from the opinion of the court:—

> The end-lines constitute a barrier, beyond which a locator cannot follow a vein on its strike, whether it be a discovery or secondary vein; and they also limit the bounding planes within which his extralateral rights are to be exercised in following such vein on its dip. In exercising such extralateral rights the locator cannot in any case pursue the vein on its dip beyond the bounding planes drawn through the end-lines. . . . . The extent of the right depends upon the length of the apex, and the extralateral rights are measured not necessarily by the end-lines, and only so when the vein passes across both end-lines, but by bounding planes drawn parallel to the end-lines passing through the claim at the points where it enters into and departs from the same. It would seem, therefore, necessarily to follow that the extralateral right depends *inter alia* upon the extent of the apex within the surface lines, and, while the end-lines of the claim as fixed by the location are the end-lines of all veins apexing within its exterior boundaries, the planes which bound such rights of different veins may be as different as the extent of their respective apices, though all such planes must be drawn vertically downward parallel with the end-lines. It makes no difference in what portion of the patented claim the apex is. Its extralateral rights under this rule can easily be ascertained.

The court was of the opinion that the rule thus enunciated was deducible from the Niagara-Black Rock case,[54] the decision in Tyler v. Last Chance M.

[54] Fitzgerald v. Clark, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac.

Co.,[55] and from the language of Judge Hallett in the Del Monte case.[56]

The opinion of Justice Brewer in the Del Monte case[57] is also said by the supreme court of Colorado to be authority for the conclusions reached by it, which are briefly summed up at the end of the opinion as follows:—

> Our conclusion is that for all veins, both discovery and secondary of a patented claim, the owner has extralateral rights at least for so much thereof as apex within the surface lines; that such rights as to secondary veins are not confined to such veins as apex within the same segment of the claim in which the apex of the discovery vein exists; and while the end-lines of the location as fixed and described in the patent are the end-lines of all veins apexing within the surface boundaries, and may constitute the bounding planes for such extralateral rights, and in no case can the locator pursue the vein on its dip outside the surface lines beyond such planes continued in their own direction until they intersect such veins, yet these bounding planes, which in all cases must be drawn parallel to the end-lines, need not be coincident.[58]

Subsequent to the rendition of this decision, the same court, in the case of Jefferson Min. Co. v. An-

273, 30 L. R. A. 803, affirmed in 171 U. S. 92, 18 Sup. Ct. Rep. 941, 42 L. ed. 87.

[55] 71 Fed. 848.

[56] 66 Fed. 212.

[57] 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72.

[58] Ajax Gold Min. Co. v. Hilkey, 31 Colo. 131, 102 Am. St. Rep. 23, 72 Pac. 447, 450, 62 L. R. A. 555, 22 Morr. Min. Rep. 585. In a later case to be presently discussed the same court said: "But the supreme court of the United States has gone further, and said that these bounding planes *must be coincident with the planes of the end-lines.*" 75 Pac., at p. 1075.

choria-Leland M. & M. Co.,[59] was called upon to consider a state of facts involving the same principles discussed and decided in the Ajax-Hilkey case. We submit a diagram of the Jefferson-Anchoria-Leland case (figure 82B), based upon the one accompanying the

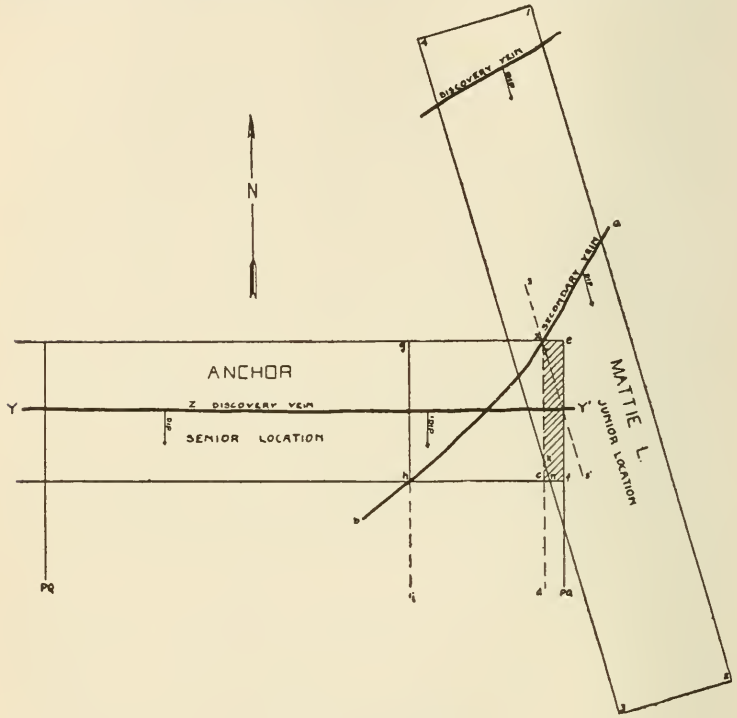


FIGURE 82B.

opinion of the court slightly elaborated. The Anchoria-Leland company owned the Anchor, and the Jefferson company the Mattie L. The Anchor was the senior of the claims both as to location and patent. The discovery vein Y-Z-Y in the Anchor crossed both end-lines, although the fact does not appear on the

[59] 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925.

diagram in the opinion. The secondary vein in the Anchor a-b crossed two side-lines. Both the discovery and secondary veins in the Mattie L. crossed the lines located as side-lines. The vein a-b was secondary in both locations. The controversy arose over the underground parts of the secondary vein lying underneath and within the conflicting surface area of both claims—i. e., within the parallelogram c-x-e-f. The contention of the Jefferson company was that the Anchoria-Leland rights in the secondary vein a-b should be defined by constructing a plane parallel to the end-line (e-f), at the point X, where the secondary vein passed out of the north side-line of the Anchor. The Anchoria-Leland Co. claimed a right to all the ore in the secondary vein underneath the Anchor surface. The court upheld the claim of the Anchoria-Leland on the theory that the question involved the intralimital rather than the extralateral rights of the Anchor claim, and that claim, being senior in point of time, secured all underground parts of the secondary vein underneath the surface, though such parts extended beyond a plane parallel to its end-lines drawn at the point on the side boundary where the apex of the secondary vein crossed such boundary at the point X and entered the territory of the junior claim.

The right of a claim owner to the underground parts of a vein beneath the surface may in a sense be referred to as intralimital. A prior locator on the dip of a vein without any part of the apex being within his boundaries may be said to have an intralimital right to the underground parts of the vein, and may defend such right as against everyone except the owner of a

location properly including the apex. But such intralimital right fades away in the presence of one properly locating on the apex of the vein. So where the apex of a vein passes through an end-line and a side-line of one claim into another, the inquiry involves not only the intralimital rights of one, but also the extralateral rights of the other. For illustration take the Niagara-Black Rock case shown on figure 75.[60] The Black Rock was the older claim with part of the apex. The ore bodies in dispute were underneath the Black Rock surface beyond the point where the vein passed out of the side-line common to the two claims. Such ore bodies were in a sense intralimital to the Black Rock, but extralateral to the Niagara. As we have heretofore noted, the state court and the supreme court of the United States in effect denied to the Black Rock any intralimital rights on that portion of the vein underneath its surface extending beyond the point where the apex crossed the side-line, awarding such underground parts to the Niagara—the junior claim—under its extralateral right.

In the case of Davis v. Shepherd, decided by the supreme court of Colorado prior to its decisions in Ajax v. Hilkey and Jefferson v. Anchoria-Leland, the court applied the principle of the Niagara-Black Rock case to the original vein—apexing for a long distance in the junior claim and passing into the senior claim. The facts of this case may be illustrated by a diagram pre-

[60] *Ante*, § 591.

pared from the record in the case, which we herewith reproduce as figure 82c.

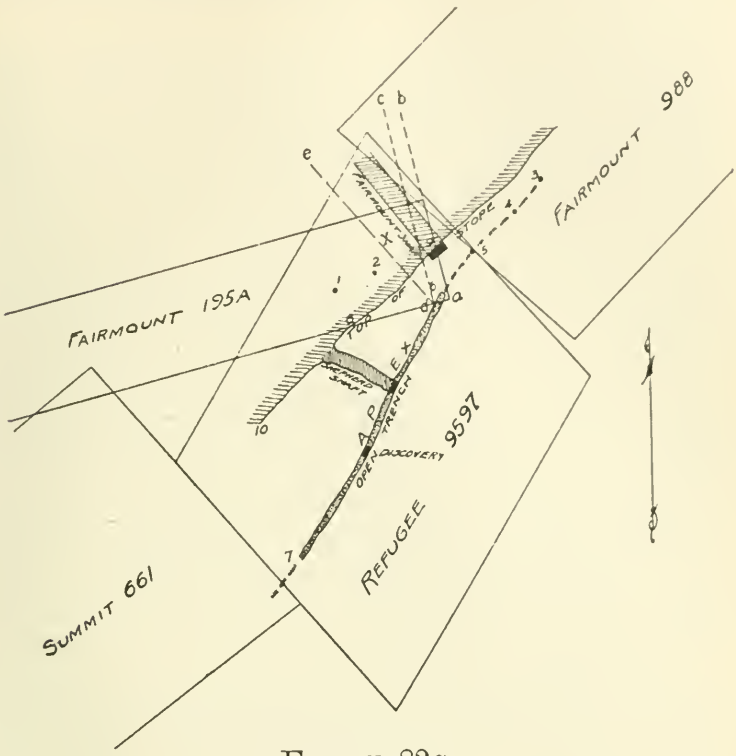


FIGURE 82c.

The Fairmount 195A was the prior location, having been patented prior to the location of the Refugee. The apex of the vein was in the Refugee for the greater part of the length of the claim—a small segment of the apex being found in the corner of the Fairmount entering across a side-line and passing out of an end-line. The controversy arose over ore bodies stoped out by the owners of the Fairmount, being in that part of the vein having the apex within the Refugee. The court

held that all that part of the vein which apexed without the boundaries of the Fairmount was not a part of that property.

Assuming the facts to be correctly portrayed on figure 82c: The extralateral right of the Fairmount would, upon the principles heretofore discussed, be defined by the planes *a-b* and *c-d*. The extralateral right of the Refugee would be defined by the plane d-e and the west end-line plane, assuming that the apex did not extend to or cross the east end-line. The triangle X would, on this hypothesis, fall to the Fairmount by gravity as a *prima facie* intralimital right, owing to the difference in direction of the end-line planes of the two properties. If we may assume that the vein crossed both end-lines of the Refugee applying the principles announced in the Stemwinder cases discussed in a subsequent section,[61] the extralateral right of the Refugee would be defined by the extension of its two end-line planes subtracting therefrom the segment of the vein pertaining to the Fairmount defined by the planes *a-b* and *c-d*.

If the right of a senior claimant on an original vein is thus limited—and that it is so limited is now well settled—we cannot understand by what process of reasoning the courts may award a greater right upon a secondary vein.

In deciding the Jefferson-Anchoria-Leland case, the court referred to its ruling in Ajax Gold Min. Co. v. Hilkey, *supra*, but held that it was inapplicable, because the rule followed in that case was so limited by reason of the fact that the counsel for Ajax company was content to accept it, and did not ask for any part of the vein beyond what the application of the rule there announced would give his clients.

61 *Post*, § 596.

With all possible deference to the distinguished court which rendered the two decisions, both of which were written by the same judge, we submit that the rule in the Ajax-Hilkey case is consistent with the decisions of the supreme court of the United States in the Del Monte case and the Niagara-Black Rock case, and the prior decision of the supreme court of Colorado in Davis v. Shepherd. If any support can be found in the adjudicated cases for the rule laid down in the Jefferson-Anchoria case, it is in what we conceive to be a misinterpretation of the decisions in the Walrath-Champion case, the doctrine of which the Colorado court in the Jefferson-Anchoria-Leland case held it was not necessary to invoke.

The application of the doctrine of the Stemwinder cases,[62] together with the support which may be drawn from the Del Monte case[63] and the Niagara-Black Rock case,[64] would certainly have given to the Mattie L. the ore bodies within the parallelogram (figure 82B) X-e-f-c, deducting the small triangle c-k-n, which was outside of and beyond the west side-end boundary of the Mattie L.

An extrajudicial suggestion has been made to the effect that the extralateral right of the Mattie L. on the vein a-b should be defined by the plane s-s′ drawn

[62] Bunker Hill & S. M. & M. Co. v. Empire State-Idaho M. & D. Co., 109 Fed. 538, 547, 48 C. C. A. 665, 21 Morr. Min. Rep. 317, 134 Fed. 268; 121 Fed. 973, 58 C. C. A. 311, 22 Morr. Min. Rep. 560; S. C., on appeal, 131 Fed. 591, 596, 66 C. C. A. 99; appeal dismissed, 200 U. S. 613, 26 Sup. Ct. Rep. 754, 50 L. ed. 620; *certiorari* denied, 200 U. S. 617, 26 Sup. Ct. Rep. 754, 50 L. ed. 622.

[63] Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[64] Fitzgerald v. Clark, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273, 30 L. R. A. 803; Clark v. Fitzgerald, 171 U. S. 92, 18 Sup. Ct. Rep. 941, 43 L. ed. 87.

through the point X parallel to the Mattie L. west sideline, upon the "free-apex" theory. In our opinion, however, the suggestion is opposed to the doctrine stated in a subsequent section,[65] where there are conflicting surface areas embracing the same apex. In such cases the formula for determining the extralateral right of a junior apex claimant may be stated as follows: Construct extralateral right planes on the junior claim as if there were no conflict, subtract the segment of the vein to which the senior is entitled. The remainder belongs to the junior claim. If the extralateral right of a senior claimant on the original vein is to be determined by the length of apex within the claim, and this is the rule clearly established in the Niagara-Black Rock case, it can hardly be plausibly urged that greater rights should be awarded upon a secondary vein. We think the decision in Ajax M. Co. v. Hilkey states the correct rule.[66]

It will be borne in mind that the Del Monte, the Niagara-Black Rock and the Walrath-Champion cases were decided by the supreme court of the United States at the same term and within eight days of each other. It is certainly not to be inferred that the Walrath-Champion case was intended by the court to overrule or qualify the epoch-making decisions in the other

65 § 596.

66 Mr. Costigan, in his work on "Mining Law," entertains the same view as the author as to the decision in the Jefferson-Anchoria-Leland case. Costigan, p. 441, note 112. Mr. Morrison, in the fourteenth edition of his "Mining Rights," inclines to the view that Ajax v. Hilkey was wrongly decided, and that Jefferson v. Anchoria-Leland stated the correct rule. Morrison Min. Rights, 14th ed., 203. Mr. Arnold, in an elaborate discussion of this case found in volume 22, Harvard Law Review, pp. 339, 343, 349, arrives at the same conclusion as expressed by the author.

two cases. The opinion in the Walrath case negatives any such intent.

In the case of Work M. & M. Co. v. Doctor Jack Pot M. Co., decided by the circuit court of appeals for the eighth circuit,[67] the question of extralateral rights on secondary veins was directly involved. The facts of the case may be illustrated by a diagram prepared from the record in the case (figure 82D).

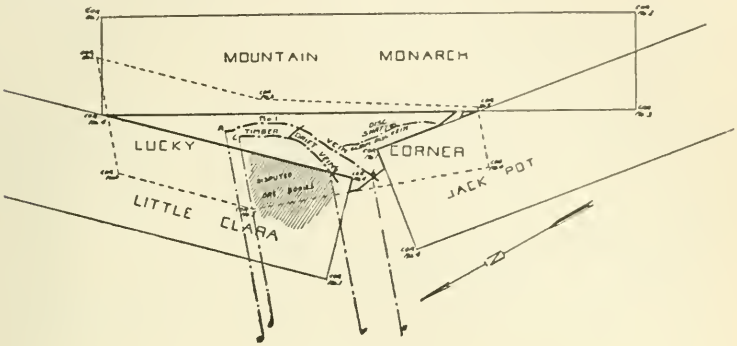


FIGURE 82D.

The net area of the Lucky Corner as patented embraced a surface in form resembling a triangle—delineated on figure 82D by the heavier black line. It was located originally in the form indicated by the dotted lines, practically all of which were laid upon adjoining claims. The application for patent and the patent itself described the periphery of the claim as located and excepted the conflicts with other claims. The end-lines on the discovery vein as located were parallel. There were two secondary veins practically parallel to each other in the shape of crescent, neither of which were shown to have crossed either end-line of the claim as located. Their position is shown approximately on

[67] 194 Fed. 620.

figure 82D. The controversy arose over the ore bodies in the secondary vein underneath the Little Clara. The court applied planes parallel to the end-lines on the discovery vein at the points where the secondary veins terminated within the location substantially as indicated on the figure.[67a]

The court followed the rule announced by the supreme court of Colorado, in the Ajax-Hilkey case, quoting at length from the opinion, but made no reference to the decision in Jefferson M. Co. v. Anchoria-Leland M. & M. Co.

As we have heretofore observed, the question under consideration presents but little serious difficulty if the secondary veins follow directions which render it possible to construct end-line planes parallel to the original, so as to cross the secondary veins at any angle. This may be illustrated in figure 83.

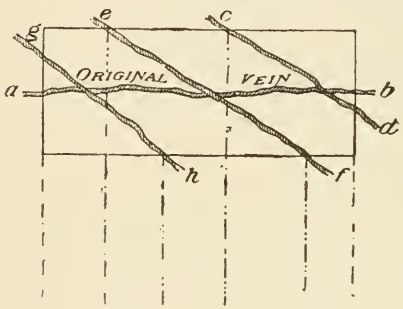


FIGURE 83.

Were it not for the existence of the original vein *a-b* with its end-line planes, the extralateral right on the secondary vein *e-f* as it crosses the side or side-end lines would be defined by a prolongation of the side-end lines.[68] But as there can be but one set of end-lines which bound the extralateral rights on all

[67a] There was a construction in this case that there was no discovery vein in fact as indicated on the diagram and the case involved the question of the conclusiveness of the patent as to the position of the apex of the vein within the surface boundaries. We will consider this subject later, *post*, § 780.

[68] *Ante*, §§ 586–589.

veins, the side-end line rule must yield in this instance.

Let us suppose, however, that a vein crosses the originally discovered vein and the claim at right angles, as illustrated on figure 84 (the vein *d-c*).

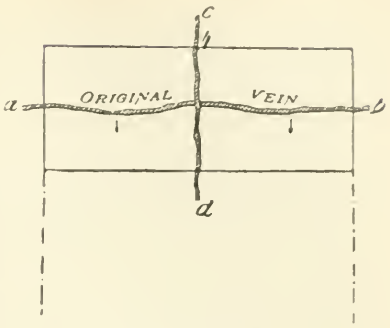


FIGURE 84.

It is manifest that the end-line plane on the original vein cannot be applied so as to cross the secondary vein at any angle. The plane so constructed would be parallel or coincident with the course of the secondary vein. Would the locator under such circumstances have any extralateral right on the secondary vein?

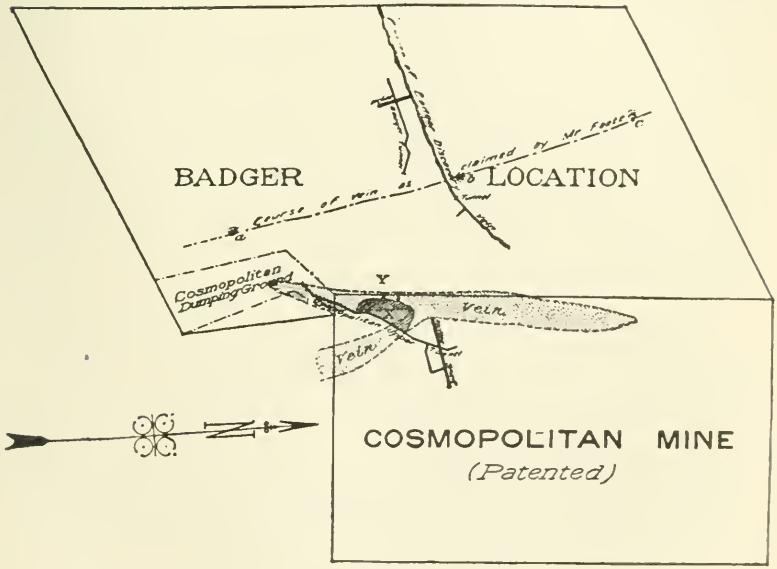


FIGURE 85.

The case of Cosmopolitan Mining Co. v. Foote,[69] decided by Judge Hawley, presents a situation somewhat similar to the one presented on figure 84, the facts of which are illustrated on figure 85.

While there was a sharp controversy over the facts, the court found that the original discovery vein in the Badger was east and west. The apex of the secondary vein was north and south, close to the west boundary of the Cosmopolitan, but to some extent entirely within the Badger. The controversy was over the vein underneath the Cosmopolitan surface. The Badger location was originally located on the assumption that the discovery vein ran lengthwise of the location, but the court found that its course was crosswise of the claim, making the located side-lines the end-lines, and as such determined the extralateral-right planes on all lodes. As it was impossible to apply these side-end line planes to the apex of the secondary or Cosmopolitan vein, so as to grant the right to the vein underneath the Cosmopolitan surface, judgment passed for the Cosmopolitan company.

Under such state of facts it is impossible to conceive upon what principle any extralateral right could be granted on the cross or secondary vein without establishing two sets of end-line planes, which, as we have heretofore seen, is not permissible.

Another complication suggests itself. Suppose the original discovery vein enters and passes out of the same line, located as a side-line, as does the secondary vein, shown on figure 65, *supra*. If the doctrine of Catron v. Old,[70] discussed in another section, should obtain—viz., that there would be no extralateral right on this vein—under such conditions would there be

[69] 101 Fed. 518, 20 Morr. Min. Rep. 497.

[70] *Ante*, § 584.

any extralateral right on a secondary vein subsequently discovered passing through the claim lengthwise and through the lines located as end-lines by the locator? Does the defect in the location of the original vein inhibit the extralateral right on the one subsequently discovered, or would the discovery of the secondary vein with its regular course confer an extralateral right on the original vein?

One thing seems quite certain—the law, as at present construed, may compel the inquiry, where two veins are found to exist within a claim, as to which one was discovered first—that is, which vein was the basis of the location—and there exists to this extent a distinction between the two classes of veins. In other respects they are of equal dignity.

§ 595. Extralateral rights on other lodes conferred by the act of 1872 on owners of claims previously located where the end-lines are not parallel.—Where a location made or a patent issued under the act of 1866 has parallel end-lines, and the location is subsequently shown to contain veins other than the one upon which the location was based, the principles heretofore discussed and applied to similar conditions arising under the act of 1872 have operative force. This class of locations presents no more serious difficulty than those made with parallel end-lines under the later law.

But where the locations made under the act of 1866 are irregular in form, with nonparallel lines crossing the lode, the situation is more complex and difficult of solution.

If we assume the correctness of the principle applied by the supreme court of California in the case of Argonaut Mining Company v. Kennedy Mining Company,[71]

[71] 131 Cal. 15, 82 Am. St. Rep. 317, 63 Pac. 148, 153, 21 Morr. Min. Rep. 163. This case was carried to the supreme court of the United

following the suggestions of Judge Field, discussed in a previous section,[72] where it was said that in the case of diverging end-lines on the original lode the extralateral right might be defined by the application of planes at right angles to the course of the vein constructed at the extremities of the vein within the location, these rectangular planes would become the legal end-lines of the original lode, so far as the determination of the extralateral right is concerned. This would result in parallelism, and would, we suggest, permit the application of the doctrine applied to secondary veins under the act of 1872, or, for that matter, to the act of 1866, where the located end-lines were parallel. The planes thus constructed, applied to secondary veins, would not necessarily be at right angles to the course of such secondary veins. This would rarely, if ever, result in applying the rule under the act of 1872.

Once conceding the correctness of the rectangular theory as applied to the original lode within a location having nonparallel end-lines under the act of 1866, it would seem logical to apply the same planes—i. e., those at right angles to the original lode—to the secondary veins. We would then have, as we now have under the act of 1872, as construed by the courts, but one set of end-line planes which should govern the extralateral rights upon all lodes found within the location, the essential requirements of the rule clearly enunciated and established by the courts.[73]

There is, however, no direct adjudication as to this question. The supreme court of California in the

States and the judgment was affirmed solely on the ground of estoppel, without discussing other questions. Kennedy M. & M. Co. v. Argonaut M. & M. Co., 189 U. S. 1, 23 Sup. Ct. Rep. 501, 47 L. ed. 685.

[72] *Ante*, § 577.

[73] *Ante*, § 593.

case of Central Eureka Min. Co. v. East Central Eureka Min. Co.[74] touched upon the subject *arguendo* as follows:—

> It might, perhaps, be contended with some force that as to these other (secondary) veins and lodes which were not embraced within the location, and the right to which was for the first time given by the act of 1872, the requirement as to parallelism of end-lines might preclude any extralateral right.

No secondary veins were involved in the Central Eureka case. The language of the court was used argumentatively in reference to the contention of counsel for the East Central Eureka. When the case reached the supreme court of the United States, that court briefly referred to the question. Said the court:—

> The plaintiff is not responsible for the form of the patent. It grants the rights that would have been granted under the act of 1866, and the fact that it also purports to grant all that would have been acquired by a location under the act of 1872 does not impart an election by the grantee to abandon the former. We do not mean to disparage the additional grant, but as pointed out by the California court the question before us does not touch that point.[75]

§ 596. Extralateral right where the apex is found in surface conflict between junior and senior lode locations—Practical application of the Del Monte case.— With the announcement of the rule that a junior lode locator may place his lines upon or across the lines of a senior claim for the purpose of acquiring rights

[74] 146 Cal. 147, 79 Pac. 834, 836, 9 L. R. A., N. S., 940.

[75] East Central Eureka M. Co. v. Central Eureka M. Co., 204 U. S. 266, 271, 27 Sup. Ct. Rep. 258, 51 L. ed. 476.

not in conflict with those previously granted, and the extension of that rule to patented claims,[76] both mineral and agricultural, there has arisen the necessity of considering the result of the doctrine as applied to the determination of the extent of the rights of the junior locator. For the purpose of this discussion

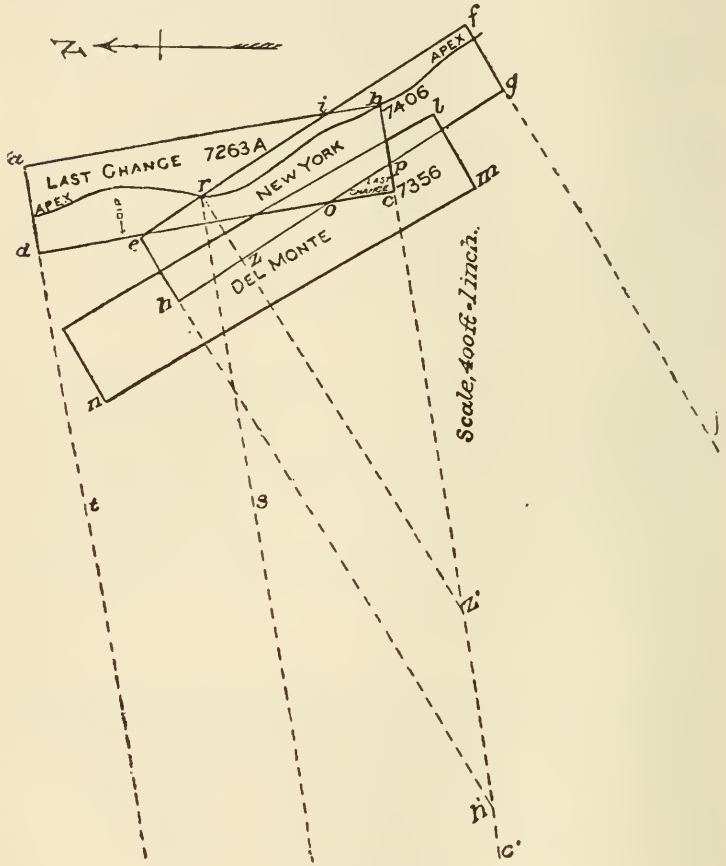


FIGURE 86.

we present a diagram of the Del Monte case, as that case was presented to the supreme court of the United

[76] *Ante*, § 363*a*.

States,[77] placing thereon dotted lines representing the extension of extralateral-right planes, to which we may have occasion to refer.

We have already observed that, by Judge Hallett's decision in Del Monte Mining and Milling Co. v. New York and Last Chance Mining Co.[78] the extralateral right of the New York on the vein was defined by the plane *r-z-z'*, parallel to the end-line plane *f-g-g'*. Whatever rights were acquired by the Last Chance, by virtue of its overlapping location conflicting with the New York, must necessarily be limited to that part of the vein which was not embraced within the prior grant.

The practical application of the rule that where a vein crosses an end-line and a side-line extralateral rights are to be defined by the crossed end-line plane, and a plane parallel to it drawn at the point where the vein departs from the side-line, could only be applied to the Last Chance upon the theory that the line *e-i*, the northeasterly line of the prior conflicting claim, the New York, constituted a *side*-line of the Last Chance claim within the meaning of the law. It was not a side-line of the *location*, as we observe that the apex crosses both end-lines of the *claim*, although the south end-line is for the greater part of its length on the New York, a prior claim. The line *e-i* was determined by the court not to be an end-line of the Last Chance. As to whether it performed the function of a side-line, the court did not determine. Treating it for argumentative purposes as a side-line, the extralateral plane *r-s-s* may be hypothetically constructed. As between the New York and the Last Chance, in the

[77] 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[78] 66 Fed. 212; *ante*, § 591.

light of the facts developed in the trial before Judge Hallett, involving only the extralateral rights of the New York as against the Del Monte, this plane, *r-s-s'*, was a compromise line between the New York and Last Chance,[79] and the question did not arise in either case as to whether the Last Chance company would, in the absence of such compromise line, be entitled to any other segment of the vein which was not covered by the extralateral planes of the New York.

If the Last Chance were prior, its extralateral right would be defined by vertical planes drawn through *a-d-t-t'* and *b-c-z'-c'*. The placing of its lines over the New York, being held to be lawful and proper, how much of the vein did the Last Chance lose when priority was determined in favor of the New York?

It being understood that all that was in issue in the case submitted to the supreme court of the United States was the right of the Last Chance company to follow the vein *north* of the plane *r-s-s'*, there was no opportunity for the court to consider the full extent of the junior locator's rights. So the court declined to define them, but reserved the question for "further consideration." Said the court in this connection:—

> It may be observed in passing that the answer to this question does not involve a decision as to the full extent of the rights beneath the surface which the junior locator acquires. In other words, referring to the first diagram [figure 86], the inquiry is not whether the owners of the Last Chance have a right to pursue the vein as it descends into the ground south of the dotted line *r-s*, even though they should reach a point in the descent in which the rights of the owners of the New York, the prior location, have ceased. It is obvious that the line *e-h*, the end-line of the New York claim, extended

[79] Figure 74, *ante*, § 591.

downward into the earth, will, at a certain distance, pass to the south of the line *r-s*, and a triangle of the vein will be formed between the two lines, which does not pass to the owners of the New York. The question is not distinctly presented whether that triangular portion of the vein up to the limits of the south end-line of the Last Chance, *b-c*, extended vertically into the earth, belongs to the owners of the Last Chance or not, and therefore we do not pass upon it. Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary now to consider that matter. All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance to pursue the vein as it dips into the earth westwardly between the line *a-d-t* and the line *r-s*, and to appropriate so much of it as is not held by the prior location of the New York, and to that extent only is the question answered. The junior locator is entitled to have the benefit of making a location with parallel end-lines. The extent of that benefit is for further consideration.[80]

The court refers to the line *e-h* as an end-line of the New York, and speaks of a triangle of the vein being formed between the line *e-h* extended across *r-s*, which triangle did not pass to the owners of the New York. Strictly speaking, the true north end-line of the New York would be the line *e-h* applied at *r*, where the vein departs from the side-line, making the line *r-z-z'*, and the triangle referred to in the opinion, the one formed by the lines *r-s-s'* and *r-z-z'*. It was contended by the owners of the Last Chance—which contention, as we have noted, the court did not feel called upon to determine—that in the absence of the contractual north

[80] 171 U. S. 55, 85, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

compromise line (*r-s*) the relative rights of the parties to the underground parts of the vein were as shown on figure 87, the New York taking all of the vein between *r-z-z'* and *f-g-g'*, and the Last Chance

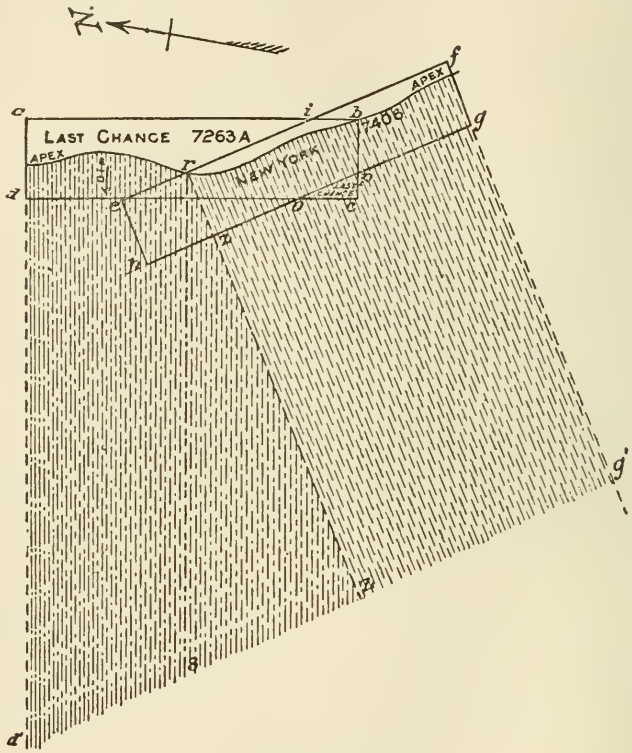


FIGURE 87.

everything between *a-d-d'* and *r-z-z'* up to the plane of intersection *b-c-c'*, shown in figure 86, the Last Chance south end-line as located. In other words, the Last Chance acquired everything within its *location* between its parallel end-lines, *a-d*, *b-c*, which was not a part of the senior location. It is quite manifest that ultimately the Last Chance would, if this view be correct, acquire the full length claimed *in depth*—i. e.,

after the New York end-line plane, *r-z-z'*, intersected and passed beyond the Last Chance end-line plane, *b-c*, produced (to point Z' on figure 86, *supra*).

This method of solution may be thus formulated:

Where two claimants locate upon the same vein, each attempting to carve out a segment in depth between parallel end-lines, a part of the apex being within a surface common to both claims, and therefore conflicting, the junior locator, his location and the position of his vein therein being such as would confer an extralateral right in the absence of any conflict, is entitled to all that part of the vein in depth lying between his extended end-line planes, less the segment which legally falls to the senior locator.

The extent to which the courts have given this question consideration in any of its phases since the decision in the Del Monte case may be gleaned from an analysis of the cases following:—

In Bunker Hill and Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co and the Last Chance company, commonly known as the first Stemwinder case, the

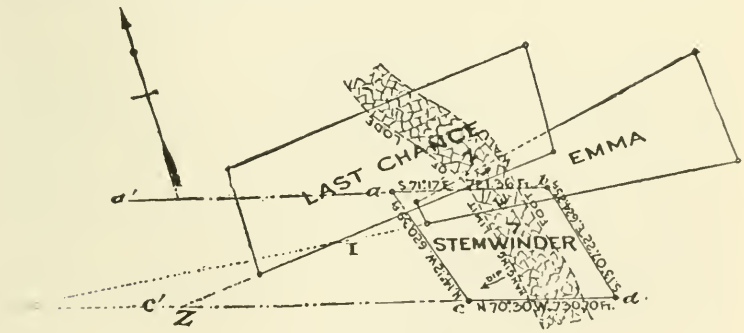


FIGURE 88.

facts of which are illustrated on figure 88, the Bunker Hill company owned the Stemwinder; the Last Chance

company owned the Emma and Last Chance. The action was ejectment to recover possession of an underground segment of the vein lying within the conflicting extended end-line planes of the Last Chance and the Stemwinder. The Empire State-Idaho company was charged as a joint tort-feasor, but owned none of the claims. The Emma was prior in point of time to both the Stemwinder and Last Chance. The Stemwinder asserted priority over the Last Chance. The extralateral rights of the Emma, with converg-

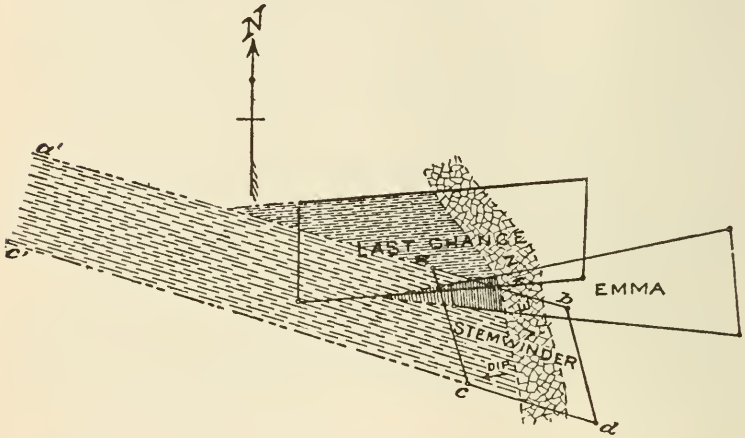


FIGURE 89.

ing end-line planes terminating at x, or in that vicinity, were conceded. The contention of the Stemwinder was, that it owned all of the vein within the extended end-line planes of the claim less the segment conceded to the Emma, with its converging end-lines, the respective underground rights of the three claims in the order of priority being defined as illustrated on figure 89.

The trial court found on the issue of priority in favor of the Stemwinder, against the Last Chance. It defined the extralateral right of the Stemwinder,

however, by converging planes—viz., the prolonged Emma south plane and the Stemwinder south boundary, intersecting at I on figure 88—awarding to the Stemwinder this segment, upon the principle that it owned only so much of the apex as was found at the surface between the Stemwinder south line and the Emma south line, and that it could not predicate any extralateral right on any part of the apex within the Emma nor cross the Emma south bounding plane.[81]

The case was taken to the circuit court of appeals, ninth circuit, on cross-writs of error. The appellate court reversed the ruling of the trial court as to the priority of the Stemwinder over the Last Chance, on the ground that at the time the Last Chance company applied for its patent there was a small triangular surface conflict between that claim and the Stemwinder, and the owners of the latter claim failed to adverse the patent application, by reason of which the priority of the Last Chance became established for all purposes.[82] Upon the appeal of the Stemwinder owners

[81] Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 108 Fed. 189.

[82] An application was made to the supreme court of the United States by the Stemwinder owners for a writ of *certiorari*, basing the application on the ground that a failure to adverse created an estoppel only as to surface area in conflict, and did not affect underground parts of the vein within the extralateral-right planes beyond the surface conflict. The writ was refused. Later the same question arose in the eighth circuit in the case of United States M. Co. v. Lawson, 134 Fed. 769, 67 C. C. A. 587. The circuit court of appeals of that circuit held that the estoppel was limited to the surface conflict and did not affect the extralateral right. The supreme court of the United States sustained this view. Lawson v. United States Min. Co., 207 U. S. 1, 28 Sup. Ct. Rep. 15, 52 L. ed. 65. The decision came too late to benefit the Stemwinder, as the decision in 109 Fed. 538, 48 C. C. A. 665, 21 Morr. Min. Rep. 317, had become the law of *that* case. The question of the effect of failure to adverse is discussed in section 742, *post*. The result of the first Stemwinder case, followed as it was by a con-

the judgment was affirmed, for the reason that the award of the court below exceeded that to which the Bunker Hill and Sullivan company was entitled with priority established in favor of the Last Chance.

But in its opinion the court discussed quite fully the Stemwinder contention that it was entitled to the entire segment of the vein within its extended end-line planes *b-a-a'* and *d-c-c'* (in figure 88), less the segment falling to the Emma, and announced its conclusion as follows:—

> But for its failure to contest the application of the Last Chance company for patent to its claim and the issuance of that instrument we should feel obliged, for the reasons first hereinbefore stated, to award the Stemwinder the right to follow the dip of the vein in question outside of its westerly side-line and between vertical planes drawn through its end lines *a-b, c-d* extended in their own direction, as against the government and all subsequent locators, saving only the surface and underground rights conceded to the Emma claim.[83]

The court held this to be the logical deduction from the decision of the supreme court of the United States in the case of Del Monte Mining and Milling Company v. Last Chance.[84]

On the cross-writ of error sued out by the Last Chance and Empire State companies the judgment was reversed.[85]

trary ruling by the supreme court of the United States, presents a concrete illustration of the principle that a refusal by that court to issue a writ of *certiorari* is not tantamount to an affirmance of the decision of the court below.

[83] Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 109 Fed. 538, 547, 48 C. C. A. 665, 21 Morr. Min. Rep. 317.

[84] 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

[85] Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 420, 52 C. C. A. 219, 22 Morr. Min. Rep. 104.

Subsequently the Bunker Hill and Sullivan company brought another action against the Empire State-Idaho company to quiet its title to so much of the vein as was found between the extended end-line planes of the Stemwinder after passing the conflict with the Last Chance. This is generally known and distinguished as the second Stemwinder case. The situation presented in this action is disclosed on figure 90.

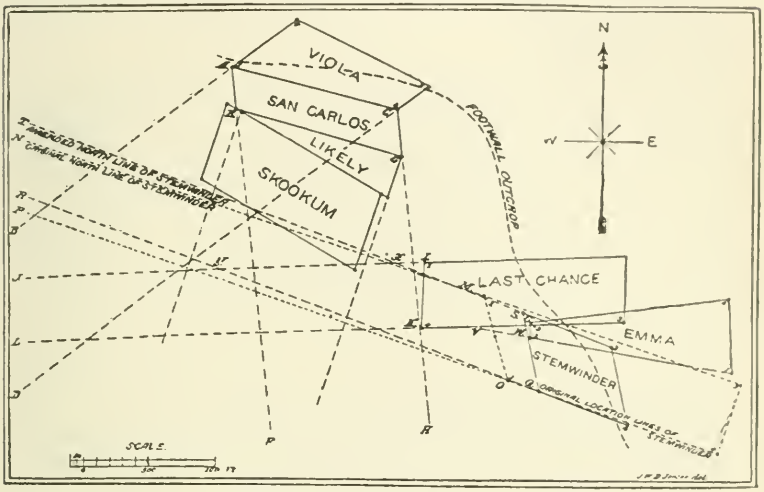


FIGURE 90.

The Empire State company owned the Viola, San Carlos, and Skookum claims, and a number of others, some of them having a part of the apex of the Stemwinder vein within their surface limits. Others were simply surface claims overlying the dip of the vein.

The Stemwinder, as originally located, was prior in point of time to all of the Empire State company's claims. It was located crosswise instead of along the vein, the surface of the original location being inclosed within the dotted lines marked *1-2-3-4* on the figure, the lines located as side-lines becoming in law

the end-lines. In recognition of this fact the owners of the claim amended the location, drew in its lines, and established its corners, *1-2-3-4*, on the smaller parallelogram within the original lines. In doing so there was a slight change in the direction given to the end-lines, as will be noted on the diagram. Between the dates of the original and amended locations of the Stemwinder some of the claims of the Empire State-Idaho, notably the Viola, San Carlos, and Skookum, intervened.

The case was submitted to the trial court, presided over by Judge James H. Beatty, sitting as circuit judge for the district of Idaho. The issue was practically limited to the determination of the ownership of the underground segment of the vein north of the Last Chance north side-end-line plane produced (*x-y-J* on figure 90) between the end-line planes of the Stemwinder.

It was earnestly contended by the Empire State company, among other things, that as the Last Chance extralateral-right bounding planes cut the vein between the Stemwinder extended planes in twain, the Stemwinder could not follow it from its apex at the surface through the Last Chance extralateral right, and therefore such rights as the Stemwinder had to the vein on its downward course terminated along the plane of Last Chance south side-end line produced (*K-L*).

The court held that as against all the claims owned by the Empire State company located subsequent to the making of the Stemwinder amended location, the Bunker Hill company was the owner of all that part of the vein in dispute lying between the amended end-

line planes of the Stemwinder. As against the claims intervening between the original and amended locations, the rights of the Bunker Hill company were limited to the south amended line and the north line of the original location.

The court expressed the opinion that this doctrine was not according to its interpretation of the Del Monte case as decided by the supreme court of the United States, but was impressed with the belief that it was supported by the decision of the circuit court of appeals in the case heretofore alluded to, involving the Last Chance and Stemwinder extralateral rights. Such being the case, it held that it was its plain duty to follow the rule stated by the appellate court.[86]

In the meanwhile, and prior to this decision, an injunction *pendente lite* had been granted by the trial judge, enjoining the Empire State company from working the segment of the vein north of the Last Chance side-end-line plane and between the planes as claimed by the Stemwinder. From the order granting the injunction, the Empire State company appealed to the circuit court of appeals, and on this proceeding many of the questions involved were settled by that court in advance of a hearing by it on the merits. Among them was the important one urged in the trial court, that the Stemwinder should be denied all extralateral right beyond the Last Chance south side-end-line plane by reason of the intervention of the prior Last Chance extralateral right. The appellate court decided the injunction appeal shortly after the decision of the trial

[86] Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 134 Fed. 268. The opinion was not published until after the decision of the circuit court of appeals, to be referred to later.

court on the merits. We herewith reproduce the diagram (figure 90A) accompanying its opinion, which presents the question in a simplified form.

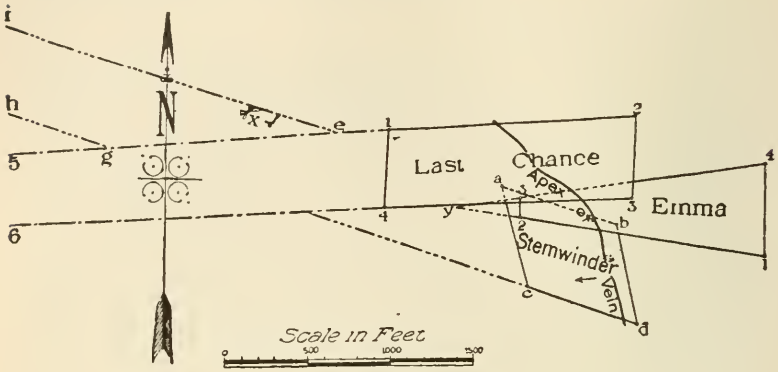


FIGURE 90A.

As to the contention referred to, the circuit court of appeals, speaking through Judge Gilbert, thus expressed its views:—

> A new and important question, however, arises in the present case from the fact that the extralateral right claimed by the appellee is cut in twain by those of the Emma and Last Chance claims, and that thereby that part of the lode which is in controversy in the present suit is detached from that part which apexes within the appellee's claim. It is contended by the appellant that by the intervention of the extralateral rights belonging to the Emma and Last Chance claims, the extralateral right of the appellee is cut off and the appellant asserts the right to mine the ledge in question by reason of other claims located to the northwestward of the Last Chance, but subsequent in time to the Stemwinder location. We know of no case in which this precise question has been presented. In Empire State-Idaho Mining and Developing Company v. Bunker Hill and

Sullivan Mining Company, 114 Fed. 417,[87] this court recognized the extralateral right of the San Carlos claim beyond the point where the prior extralateral right of the Viola claim ended, but in that case the Viola extralateral right did not wholly intervene at any point to cut off the ore body to which the San Carlos had the extralateral right; in other words, there was in that claim upon the outcrop of the ledge in the surface location, a point from which the owners of the San Carlos could, without interruption and continuously, proceed on the ledge on its downward course to the full extent of the extralateral right awarded by the court. By section 2336 of the Revised Statutes, it is provided that where two or more veins intersect or cross each other, the prior locator shall be entitled to all the mineral contained within the space of intersection, and that the subsequent locator shall have the right of way through the space of intersection for the purpose of the convenient working of his mine. The case so provided for by statute is not the precise case of two conflicting extralateral rights upon the same ledge, which is here presented, but in principle it is the same. If the vein upon which the Stemwinder is located were in fact a separate vein from that on which the Last Chance is located, but passed through the latter in the same direction in which extralateral rights are claimed in the present suit, there could be no doubt of the right of the owner of the Stemwinder to pursue the vein beyond the point of intersection and to maintain a right of way through the vein of the Last Chance at the point of intersection. We see no reason why that right, which is so recognized by the statute, and which would probably be recognized in the absence of a statute, shall be denied when the point of intersection of extralateral rights is not upon separate veins, but the same vein.[88]

[87] For illustration of this case, see figure 61, *ante*, p. 1313.

[88] Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 121 Fed. 973, 976, 58 C. C. A. 311, 22 Morr. Min. Rep. 560.

This ruling was followed as establishing the "law of the case," on the appeal on the merits.[89]

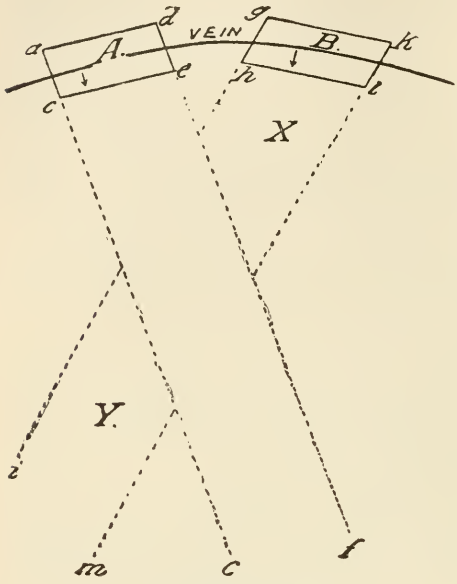


FIGURE 91.

Assume a case of two locations, each covering a part of the apex of the same vein, without surface conflict. Figure 91 represents such a case. A is the senior, and B the junior. Each has a grant from the government to their respective claims, the terms of which are precisely alike. Each has been granted the surface of his respective claim, together with all veins which have their tops, or apices, within such surface, throughout their entire depth, although they may in their downward course enter the land adjoining. There is no limitation on the face of either grant. There has been conveyed to A the vein with its extralateral extension *a-c-c, d-e-f,* and to B *g-h-i* and *k-l-m.* The fact that there is an underground conflict between the two is not disclosed on the face of their respective titles. B's right would, in the absence of an underground conflict with A's end-line planes, take the seg-

[89] Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 591, 596, 66 C. C. A. 99; appeal dismissed, 200 U. S. 613, 26 Sup. Ct. Rep. 754, 50 L. ed. 620; *certiorari* denied, 200 U. S. 617, 26 Sup. Ct. Rep. 754, 50 L. ed. 622.

ment *g-h-i* and *k-l-m*. But as the government cannot grant the same thing twice, B's rights must yield to the extent that they conflict with A's.

Again: If D grant Black Acre to C, having previously granted to E a surface parallelogram passing through the center of it, the grant to C is effective as to all that part of Black Acre not previously alienated. This is an elementary rule of real property.

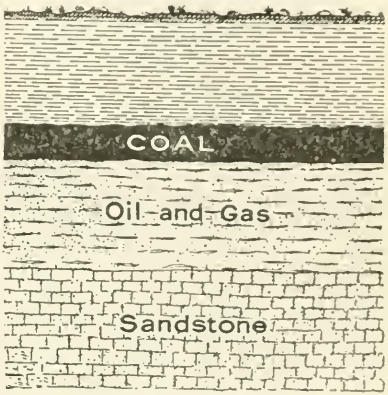


FIGURE 92.

Take another illustration. Figure 92 is a cross-section through White Acre, belonging to A, his ownership extending from the surface downward *usque ad orcum*. Underneath the surface there is first a horizontal stratum of coal, then a zone containing oil and gas resting upon a bed of sandstone.

That A may sever the title to any one or more of the different deposits from the title to the surface without affecting his right to the remainder, and without reciting in the conveyance any terms of reservation, is elementary.[90]

A conveys the coal stratum to B. His ownership of the oil, gas and sandstone are unaffected.

[90] Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 295, 34 Am. St. Rep. 645, 25 Atl. 597, 599; Lillibridge v. Lackawanna Coal Co., 143 Pa. 293, 24 Am. St. Rep. 544, 22 Atl. 1035, 1037, 13 L. R. A. 627; Smith v. Jones, 21 Utah, 270, 60 Pac. 1104, 1105, and numerous cases cited; Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140, 99 Pac. 483, 486, 20 L. R. A., N. S., 211.

A grant of this character was involved in a case considered by the supreme court of Pennsylvania, wherein the grantee of the coal seam claimed by virtue of his grant the underlying oil and gas. Said the court as to this contention:—

> Prior to the sale of the coal his (the grantor's) estate, as before observed, reached from the heavens to the center of the earth. With the exception of the coal his estate is still bounded by those limits.[91]

In the case illustrated on figure 90 the government originally owned all the land and all the vein. It sold to different grantees different parts of the land and vein. To the Last Chance and Emma may be awarded what their prior grants call for without affecting the right of the government to dispose of the remainder, the Stemwinder taking title to such parts of both vein and surface as were not included in the prior grants, and those coming after the Stemwinder taking whatever of the remainder they may see fit to appropriate.

It is well settled that in construing conveyances between private parties the granting of a section of a vein of mineral does not operate to transfer the vein *in toto*. The title to the unconveyed portion remains undisturbed, with probably a right of access through the conveyed portion.[92]

The application of this method of adjusting the rights of apex proprietors, whose extralateral right

[91] Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 296, 34 Am. St. Rep. 645, 25 Atl. 597, 598.

[92] Montana M. Co. v. St. Louis M. Co., 204 U. S. 218, 27 Sup. Ct. Rep. 254, 51 L. ed. 444; Montana M. Co. v. St. Louis M. & M. Co., 183 Fed. 51, 60, 105 C. C. A. 343.

planes intersect whether there be a surface conflict or not, is exhibited in figure 92A.

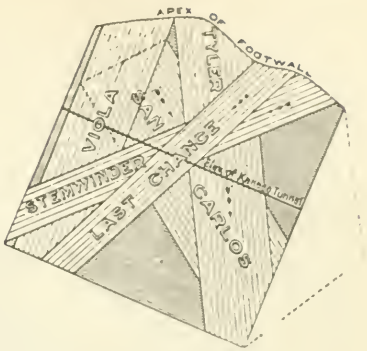


FIGURE 92A.

This is the result of the decisions of the courts adjudicating the rights of the claimants in the litigation between the Bunker Hill and Sullivan Mining and Concentrating Company and the Empire State-Idaho Mining Developing Co. and its predecessors in title, discussed in previous sections.

The case of Davis v. Shepherd,[93] discussed and illustrated in a previous section,[94] presented a situation where there were conflicting surface locations each having a part of the apex. It was in effect determined by the application of principles heretofore discussed.

In the case of Big Hatchet Consolidated M. Co. v. Colvin,[95] the facts of which may be illustrated by a diagram which we insert as figure 92B, a question of overlapping surfaces and conflicting apex rights arose between the Washington and the Cook claims. The Cook was the prior patent. The Washington patent describes the claim in the ordinary form by tracing its exterior lines and excepting the area in conflict with the Cook.[96] The court in effect ruled that when a junior patented claim overlaps senior claims and the patent describes the full area of the location as orig-

[93] 31 Colo. 141, 72 Pac. 57, 22 Morr. Min. Rep. 575.

[94] § 595, figure 82C.

[95] 19 Colo. App. 405, 75 Pac. 605.

[96] The author is indebted to Messrs. Morrison & De Soto, of Denver, for the information. They examined the record at his request.

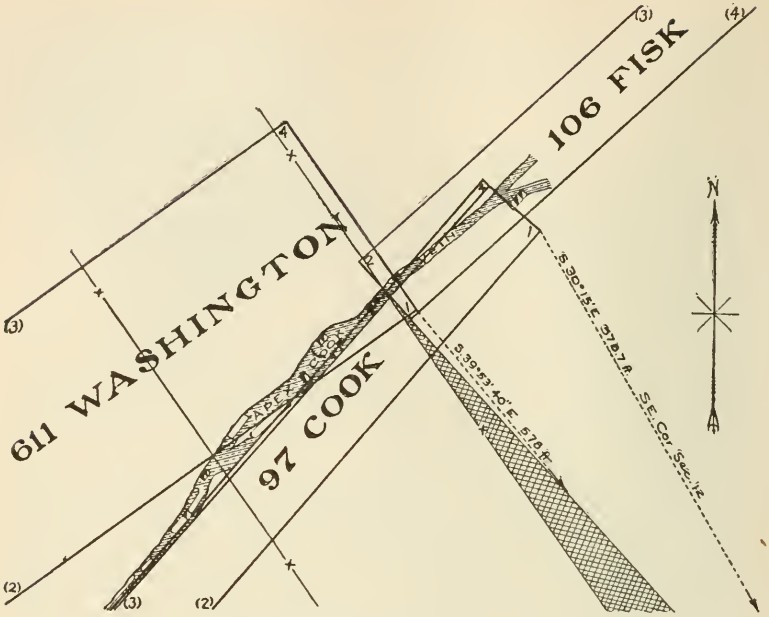


FIGURE 92B.

inally marked on the ground, the end-lines being parallel and the areas in conflict are excepted from the junior patent, the extralateral right of the junior patentee is to be determined by the original lines of the location as defined in the patent, deducting such extralateral parts of the vein as fall to the senior locations. In other words, the end-lines are not those formed by the boundaries of the senior locations.

The mere fact, if it be true, that the vein cannot be followed continuously from the outcrop to the segment in dispute, there being possibly no reserved easement in the prior grant to that effect, is the suggestion of a mere inconvenience to the junior locator and not a limitation upon his title beyond the plane of conflict. The statute provides for a grant of the *vein* through-

out its entire depth between the end-lines of the location, and not merely the right to follow it.

In a case considered by the supreme court of Montana, the facts of which are explained by a diagram accompanying the opinion, which we herewith reproduce as figure 93, the location of a claim called the Copper Trust was so placed as to embrace, with the exception of two small triangles, A-B and C, the apex of the vein and surface ground covered by prior patented claims. The discovery was made within the small triangle A-B, which was then vacant. The probable object in making the location was to obtain title to the triangular underground segment of the vein

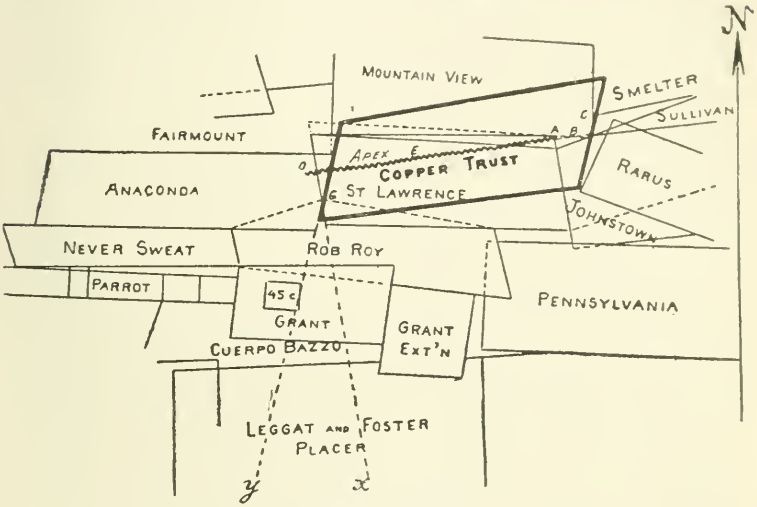


FIGURE 93.

formed by the divergence of the end-lines of the Anaconda and St. Lawrence—i. e., the triangle *G-y-x* underneath the surface of the Rob Roy and other claims. Having made this location, the owner of the Copper Trust brought an action in trespass, and made application to the trial court for an order permitting him

to inspect, sample, and survey the extensive underground works of the St. Lawrence, Anaconda, Never Sweat, and other claims owned by the Anaconda and the Washoe copper companies. The trial court granted the order, whereupon the defendant companies applied to the supreme court of the state for a "writ of supervisory control" to review and annul the action of the trial court. The companies admitted that the triangular segment of the vein in controversy was not within the extralateral rights of any of their claims, but claimed such segment by virtue of the ownership of the overlying surface. The owner of the Copper Trust claimed ownership under the doctrine of the Del Monte case, asserting his right to place his lines over the prior patented claims for the purpose of securing underground rights not in conflict with the prior claims —to wit, the triangle *G-x-y*. The extent of the privilege of inspection and survey granted by the lower court—viz., to enter any or all the underground workings of all the claims for a period of forty days, to employ six engineers and assistants to conduct the work of survey and inspection, and to demand that he and his corps of engineers and assistants be lowered into the mines and hoisted to the surface whenever such service should be required—was somewhat out of proportion to the amount of apex held by the Copper Trust, free from surface conflicts with prior claims, as it confessedly appeared to be within a triangle having a base of ten feet, clear ground. The supreme court of Montana expressed the view that the decision in the Del Monte case would not sanction the making of a location over patented claims in the manner in which the Copper Trust was located. That whatever

extralateral rights pertained to that claim were limited to the extent of apex found in the triangle embracing it, and that such rights could not be exercised beyond the east end-line of the St. Lawrence; that the Copper Trust has no part of the apex of the vein so situated with reference to the ore bodies in dispute within the triangle *G-y-x*, which enables the owner to pursue the vein from the surface. He cannot pass through the St. Lawrence from the point at which he made discovery or from any point within any surface owned by him; therefore, he is not in a position by virtue of his location to maintain his claim to the ores in controversy; *prima facie,* such ore bodies belong to the copper companies by virtue of their common-law rights to the Rob Roy and claims to the south. The action of the court below was reversed.[97]

These views are not in harmony with what we understand to be the decisions of the circuit court of appeals and the circuit court in the Stemwinder cases. But lack of harmony between courts of different independent jurisdictions in the construction of the mining laws is a matter of frequent occurrence. For this reason, the law often remains in a state of uncertainty until the questions are finally decided by the supreme court of the United States. Even then courts at times disagree as to the proper construction to be given to the decisions of the court of final resort.

Judge Beatty, in his decision in the second Stemwinder case,[98] seems to have entertained a view which,

[97] State ex rel. Anaconda C. Co. v. District Court, 25 Mont. 504, 65 Pac. 1020.

[98] Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., decided January 17, 1903, but not reported until 1905, 134 Fed. 268, 270.

had his judgment not been controlled by his interpretation of the opinion of the circuit court of appeals in the first Stemwinder case,[99] would have resulted in an opinion quite in harmony with the Copper Trust case, which, however, he did not refer to. We quote from his opinion:—

> If it [the contention of the Bunker Hill Co.] is correct, then the locator of an unclaimed apex of even ten feet may overlap other valid locations for fourteen hundred and ninety feet and thereby claim extralateral rights for the distance of fifteen hundred feet of all the fractional underground portions of the ledge not included in prior extralateral rights. If this is the law, it must lead to great confusion of rights. It is said that the supreme court has in effect so held. I am unable to so read its decisions.

But the Judge felt constrained to follow the decisions of the appellate courts, which ultimately ripened into the rule announced in the second Stemwinder case heretofore discussed. The supreme court of the United States was appealed to in order to settle the question, but writs of *certiorari* were refused and appeals dismissed without passing upon the merits. It is well recognized that this action of the court of last resort is not tantamount to an affirmance of the decisions of the courts below, or a recognition of the correctness of the opinion of such courts.

§ 597. Extralateral right where the apex is found in surface conflict between junior lode locations and prior placer or agricultural patents.—If the views of the tribunals discussed in previous sections[100] are correct

[99] 109 Fed. 538, 48 C. C. A. 665, 21 Morr. Min. Rep. 317.
[100] §§ 363, 363a.

expositions of the law, and it is permissible for a junior lode locator to place his lines upon, for example, a prior patented agricultural tract containing a part of the apex of a vein, for the purpose of acquiring an extralateral right out of and beyond the vertical plane drawn through the patented agricultural boundary we may briefly inquire into the extent of such rights and how they are to be defined.

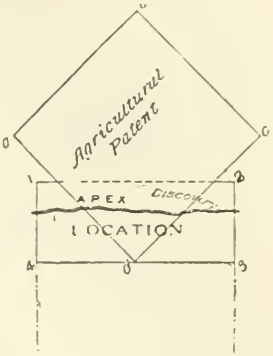


FIGURE 94.

To illustrate, by reference to figure 94, a prospector discovers the vein at a point on unappropriated land, and it is found to cross on its course the corner of a prior patented agricultural claim. Exercising the privilege which the land department and the courts permit, he locates in the manner indicated the claim *1-2-3-4*. The agricultural patentee's rights on this vein do not extend beyond the vertical planes *a-d* and *d-c*. Does the mining claimant acquire all of the vein between his extended end-line planes except such part of it as is within the agricultural patent? The logical application of the rule sanctioned by the department and its interpretation of the Del Monte case leads to the inevitable conclusion that the locator's rights would be thus defined. If this be so, a like rule should be applied to the situations assumed on figures 95 and 96.

Illustrations of this character might be indefinitely multiplied. These illustrations also present opportunities for the possible application of the "theoretical

apex'' doctrine tentatively discussed in a preceding section.[1]

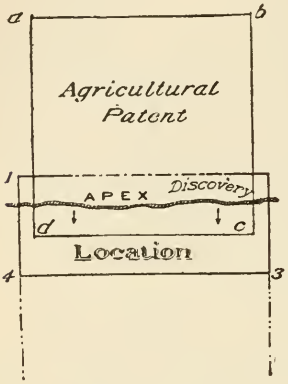


FIGURE 95.

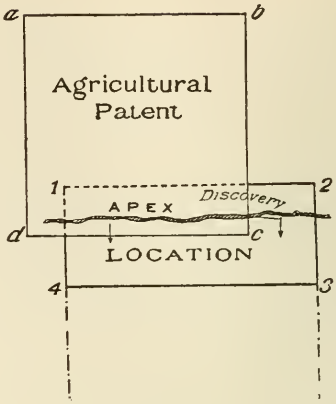


FIGURE 96.

The only litigated case which to our knowledge has engaged the attention of the courts wherein any of these problems were discussed was the case of Wedekind v. Bell, tried before Judge Talbot, district judge of Washoe county, Nevada. The phenomenal richness of the deposit involved attracted wide attention, and the case became to some extent a *cause célèbre*.

We illustrate the facts of the case by the use of figure 96A. A more elaborate representation accompanies the opinion of the supreme court of Nevada, dismissing the appeal.[2]

[1] § 312a. The cases illustrated on figures 95 and 96 would seem to warrant the application by analogy of the *conventional* apex discussed *post*, section 618a, reviewing the case of the Montana Ore Purchasing Co. v. Boston & Montana M. Co. (on rehearing), 27 Mont. 536, 71 Pac. 1005, defining the extralateral right of a mining claim containing a part of the apex.

[2] Wedekind v. Bell, 26 Nev. 395, 99 Am. St. Rep. 704, 69 Pac. 612.

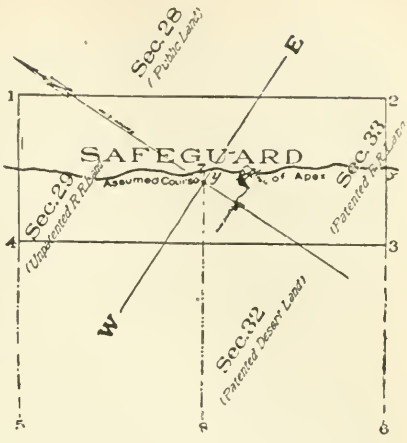


FIGURE 96A.

As will be observed from the diagram, section 33 is patented railroad land; section 32, patented desert land; section 28, public land; and section 29, unpatented railroad land. Wedekind owned section 29 and that part of section 33 covered by the Safeguard claim, acquired by purchase from the railroad company. He also owned the Safeguard mining claim, lying partly in the four sections, based upon a discovery in section 28 within the limits of his location. Bell owned section 32, underneath the surface of which were the ore bodies in dispute. Wedekind contended that he had the apex of the vein within that part of his location in section 33, and therefore, although it had been previously patented to the railroad company, he had a right, by virtue of the Safeguard location, to follow the vein under the Bell tract, and that Bell committed a trespass by extracting the ore from the vein underneath his (Bell's) surface. This was the controversy in the case. If section 33 had been public land, a question would arise as to whether a junior lode claimant, having located the apex outside of the prior desert land patent, would have a right to follow the vein under such desert land. We will endeavor to show in a subsequent section that this is a debatable question.[3]

[3] *Post*, § 612.

Leaving this element out of consideration for the time being, and assuming that the junior apex proprietor could not pass underneath the prior agricultural patent, there is but little doubt that the extralateral right of the Safeguard would be defined by the planes 1, 4, 5, and the vertical plane drawn through the section line *y*-W, the unpatented railroad land in section 29 being dealt with as public land.[4]

But Wedekind claimed the extralateral right based in a measure upon his location in section 33, theretofore patented to the railroad company whose consent to the making of the location had been obtained. In other words, he contended that the title to neither section 33 nor 32 carried common-law rights as against one locating the apex of the vein; that the common law of England was never in this regard adopted in Nevada; that state had a common law of its own, which construed all government grants as subordinate to miners' rules and customs, which sanctioned the location of an apex within prior patented agricultural lands (with the consent of the owner), and the predication thereon of an extralateral right underneath prior patented agricultural lands. Or, as his counsel stated it:—

> No part of the common law is applicable to mining controversies if it is inconsistent with the usages and customs which are peculiar to mining. . . . . The English common-law maxim, that the owner of the surface of land owns everything above and beneath it was never adopted in Nevada. . . . . Mining [in Nevada] is our paramount industry. The policy of our laws is to encourage and extend it. It has the right of eminent domain. All other property is held subject to be taken for it, and all doubts must be so resolved as to promote this state policy.

[4] *Ante*, § 154.

The trial court held with this contention and awarded judgment in favor of Wedekind. Bell appealed. Pending the appeal, the interest of both parties seemed to have been united in a third person, who became *dominus litus* on each side of the case, and while each of the former contending factions were desirous of having the supreme court pass upon the merits of the controversy, neither of them having anything to lose, the court declined to do so and dismissed the appeal.[5]

§ 598. **Conclusions.**—It is quite manifest, from a review of the foregoing sections of this article, that we have not undertaken to present all possible combinations arising from either the forms of location or the erratic course of veins through them. Hypothetical cases without number might be assumed, illustrated, and discussed, without material advantage to either the practitioner or the author. Many of them may be solved by the application of established principles. Others present individual types, which will, should they arise, perplex the courts, even in the absence of controverted questions of fact. It has been our aim to confine our treatment of the subject to the exposition of the law as found in the adjudicated cases, and applying the principles which seem to be sanctioned by the current of judicial authority to a few hypothetical cases which appear to us to be susceptible of solution by resorting to such principles. We may admit that as to some of these hypothetical cases the position assumed by us is open to debate and criticism, but in the main we think we have fairly presented the existing state of the law on this important subject, and are justified in deducing therefrom the following rules:—

[5] Wedekind v. Bell, 26 Nev. 395, 99 Am. St. Rep. 704, 69 Pac. 612.

(1) Under the act of 1866, parallelism of end-lines was not essential to the exercise of the extralateral right. The vein might be pursued in depth indefinitely between planes at right angles to the general course of the vein applied at the extremities of the vein within the location if the end-lines of the claim diverged in the direction of the dip. If they converged the extralateral right would be defined either by projecting the converging end-line planes to the line of intersection or possibly by the application of rectangular planes, if such planes did not encroach upon the rights of adjoining apex proprietors, or the element of estoppel did not exist. If they were parallel, no controversy as to the extralateral right could possibly arise;

(2) Under the act of 1872, parallelism of end-lines is essential, except where the opposite boundary lines, crossed by the lode, converge in the direction of the dip;

(3) In order to enjoy the extralateral right, the locator must include within his boundaries some part of the apex of a discovered vein;

(4) Where a vein crosses two opposite parallel side-lines, the extralateral right is defined by producing such side-end lines indefinitely in the direction of the dip, and the angle at which the lode crosses these lines is of no moment;

(5) Where a vein, located under the act of 1872, crosses two opposite nonparallel side-lines, if such lines diverge in the direction of the dip, there can be no extralateral right. Where, as produced, they converge and intersect beyond the limits of the location, the vein may be pursued in its downward course to the line of intersection of the two planes, at which line the extralateral right ceases;

(6) Where such a vein crosses one of the lines designated by the locator as an end-line, and departs through a side-line, the extralateral right is defined by reference to the direction of the crossed located end-line. A plane parallel to one drawn through such crossed end-line, produced indefinitely in the direction of the dip, applied at the point where the lode crosses the side-line, will carve out a segment of the vein throughout its entire depth, which will belong to the locator;

(7) Where the apex of the located vein crosses none of the boundaries of the location, but lies wholly within such boundaries, or crosses one end-line and fails to reach any other boundary, the extralateral right is defined by reference to planes drawn through the located end-lines;

(8) Where the location contains more than one vein the extralateral right as to all secondary veins is to be defined by the same set of end-lines as limit that right on the original lode, such planes to be applied at the extremities of the secondary vein at the surface within the location. This rule is applicable to locations made under either the act of 1866 or the act of 1872. The application of this rule is subject to this qualification: that such planes must be so applied to the secondary vein as to cross the lode. Where their application would produce a plane parallel or coincident with the course of the secondary vein there could be no extralateral right on such vein.

(9) Where the extralateral-right planes of two locations conflict, each having a part of the apex of the vein within their respective surface boundaries, the junior locator takes such segment of the vein within his extralateral bounding planes as remains after satisfying the extralateral right of the prior grant.

If these principles are fairly deducible from the adjudicated cases, the difficulties surrounding the application of the law are reduced to a minimum. What is most essential is certainty of the rule and uniformity in its application. It is better that the principle established should be certain and definite, even if it is not based upon incontrovertible logic or the perfection of human reasoning.

Article IV. Construction of Patents Applied for Prior, but Issued Subsequent, to the Act of 1872.

§ 604. Patents applied for under the act of 1866, but issued after May 10, 1872, to be construed as if issued under the prior law.

§ 604. Patents applied for under the act of 1866, but issued after May 10, 1872, to be construed as if issued under the prior law.—At the time the act of July 26, 1866, was repealed, and the old system gave place to the new, a great many applications for patent were pending before the land department, based upon locations made either under the repealed law or prior to its enactment. In some instances, final entry and payment had been made, and the receiver's receipt or certificate of purchase had been issued, leaving nothing further to be done save the formal issuance of the patent. In other cases, action on the part of the land department was suspended, awaiting the determination of adverse conflicting claims. In still others, the preliminary steps had been taken, and only awaited the lapse of the requisite period enabling the applicant to make final entry and payment. Recognizing these conditions, congress incorporated into the new law the following provisions:—

> Sections one, two, three, four, and six of an act entitled, "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July 26, 1866, are hereby repealed, but such repeal shall not affect existing rights. Applications for patents for mining claims now pending may be prosecuted to a final decision in the general land office; but in such cases, where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act; and all patents for mining claims heretofore issued under the act of July 26, 1866, shall convey all the rights and privileges conferred by this act, where no adverse rights exist at the time of the passage of this act.[6] . . . . *Provided*, that nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws.[7]

This manifests the unequivocal intention of congress to preserve all rights previously acquired, and the act must be so construed.[8]

There is nothing in the terms of the new act which required the applicant to institute proceedings *de novo*, or to go into the field and re-form the lines of his survey so as to include within his boundaries only so much surface as was permitted under the act of 1872, where under the pre-existing law and local rules he might have been entitled to more. He was not required to

[6] Act of May 10, 1872, § 9; 17 Stats. at Large, p. 94.

[7] Id., § 10.

[8] Eclipse G. & S. M. Co. v. Spring, 59 Cal. 304, 305; Argonaut M. Co. v. Kennedy M. Co., 131 Cal. 15, 82 Am. St. Rep. 317, 63 Pac. 148, 151, 21 Morr. Min. Rep. 163; Central Eureka M. Co. v. East Central Eureka M. Co., 146 Cal. 147, 79 Pac. 834, 835, 9 L. R. A., N. S., 940; East Central Eureka M. Co. v. Central Eureka M. Co., 204 U. S. 266, 27 Sup. Ct. Rep. 258, 15 L. ed. 476. See New Dunderberg v. Old, 79 Fed. 598, 601, 25 C. C. A. 116; Crane's Gulch M. Co. v. Scherrer, 134 Cal. 350, 86 Am. St. Rep. 279, 66 Pac. 487, 488, 21 Morr. Min. Rep. 549.

republish a notice of his application for patent, and open the door to outside claimants who had been barred by the lapse of time under the previous law.

The object of the original act, as well as the one which superseded it, was to require the claims of all parties to be adjusted prior to the issuance of a patent. The proceedings before the land department are judicial in character, and the publication of notice as required brings all parties into court; and if outside claimants stand by and allow the statutory time for filing adverse claims to elapse, their rights, so far as the same might have been determined in such proceedings, are forever lost.[9]

To insist that the applicant should abandon his proceedings initiated prior to the passage of the act of 1872, reopen his case, and proceed thereafter in strict conformity with the new law, would be to deprive him of a substantial right which was preserved to him by the law itself.

The land department, which had acquired jurisdiction under the original law, was not deprived of that jurisdiction under the new act. If it had power to issue the patent at all, in doing so it could only recognize the conditions as they existed at the time the application was filed.

We therefore encounter numerous patents, bearing date subsequent to the passage of the act of May 10, 1872, which describe surface areas of such form and extent as to be practically invalid if issued under that act, but which are not open to objection where it is shown that they were issued upon proceedings instituted while the act of 1866 was still in force. Such patents are to be construed as if they had been issued

9 Kannaugh v. Quartette M. Co., 16 Colo. 341, 27 Pac. 245, 246; Wolfley v. Lebanon M. Co., 4 Colo. 112, 13 Morr. Min. Rep. 282.

under the act of 1866, while receiving the supplemental rights and privileges conferred by the act of 1872.[10] This we understand to be the logical result of the decisions.[11]

As a patent relates back to the inauguration of the right,[12] the proceedings under which title originated may be proved. This is no attack upon the patent.[13]

It has been urged that the cases of Lakin v. Dolly[14] and Lakin v. Roberts[15] are authority for the proposition that after the passage of the act of 1872 no patent could issue for a mining claim located prior to the passage of the act for a surface exceeding three hundred feet in width on each side of the center of the vein, whatever greater rights the locator might have

[10] As to rights in secondary veins within patented claims based on locations made under the act of 1866, see *ante*, § 593.

[11] Eureka Cons. M. Co. v. Richmond M. Co., 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578; Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. 597, 599, 83 Fed. 658, 28 C. C. A. 333, 19 Morr. Min. Rep. 118; Cons. Wyoming v. Champion M. Co., 63 Fed. 540, 541, 18 Morr. Min. Rep. 113; New Dunderberg v. Old, 79 Fed. 598, 601, 25 C. C. A. 116; Argonaut M. Co. v. Kennedy M. Co., 131 Cal. 15, 82 Am. St. Rep. 317, 63 Pac. 148, 151, 21 Morr. Min. Rep. 163; Central Eureka M. Co. v. East Central Eureka M. Co., 146 Fed. 147, 79 Pac. 834, 835, 9 L. R. A., N. S., 940; East Central Eureka M. Co. v. Central Eureka M. Co., 204 U. S. 266, 27 Sup. Ct. Rep. 258, 51 L. ed. 476.

[12] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 640, 26 L. ed. 875, 11 Morr. Min. Rep. 673; Kahn v. Old Telegraph Co., 2 Utah, 174, 11 Morr. Min. Rep. 645; Deno v. Griffin, 20 Nev. 249, 20 Pac. 308, 309; Eureka Case, 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578; Butte City Smokehouse Lode Cases, 6 Mont. 397, 12 Pac. 858, 861; Talbott v. King, 6 Mont. 76, 9 Pac. 434, 440; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, 5 Pac. 570, 580; *post*, § 783.

[13] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 645, 26 L. ed. 875, 11 Morr. Min. Rep. 673; Kahn v. Old Telegraph Co., 2 Utah, 174, 11 Morr. Min. Rep. 645; Last Chance M. Co. v. Tyler, 61 Fed. 557, 565, 9 C. C. A. 613; *post*, § 783.

[14] 53 Fed. 333.

[15] 54 Fed. 461, 4 C. C. A. 438.

had as to such surface under the pre-existing local rules.

The facts of this case may be illustrated by the aid of figure 97. The unshaded portion embraced the town of Johnsville, covering 252.95 acres of land, connected with the location of one lode. The application for patent was made in 1867, but no entry or payment was made until 1877.

It appeared at the trial of the case, upon an agreed statement of facts, that when the Mammoth claim was located there was no law, local rule, usage or custom authorizing surface to be appropriated in excess of one hundred feet on each side of the vein, and that the unshaded area shown on the diagram never was covered by the Mammoth location.[16]

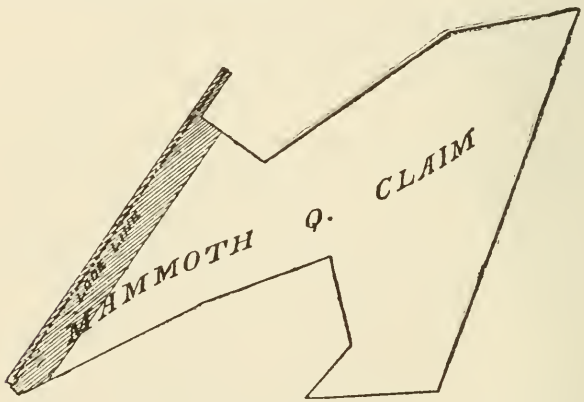


FIGURE 97.

This was an admission which practically went to the jurisdiction of the land department to issue a patent for an area in excess of the amount allowed by local rules.[17] This case has been twice explained by the

16 Statement by the court, Lakin v. Dolly, 53 Fed. 333.

17 See Parley's Park S. M. Co. v. Kerr, 130 U. S. 256, 261, 9 Sup. Ct. Rep. 511, 32 L. ed. 908, 17 Morr. Min. Rep. 201.

appellate court which handed down the opinion. The first explanation is found in what is known as the North Star case,[18] wherein a patent had been issued for a surface varying from six hundred and fifty feet to twelve hundred and fifty feet in width. The locations were made and patent applied for prior to the passage of the act of 1872, but patent did not issue until 1875. The validity of the patent was assailed on the ground that it granted more surface than was allowed under the act of 1872, and the Lakin-Dolly-Roberts case was relied upon to support the attack.

The court declined to accept the Lakin-Dolly case as applicable, by reason of the difference in the facts. In the North Star case there was nothing in the record to show any limitation as to the amount of surface allowed under the local rules, and it was conceded that the original location covered the entire tract patented.

The same court subsequently, in the case of Peabody Gold Mining Company v. Gold Hill Mining Company,[19] was again called upon to meet the same contention. In doing so it thus stated its views as to its decision in the Lakin-Dolly-Roberts case:—

> The admitted facts effectually rebutted the presumption which otherwise would have attended the patent, the presumption that the locator was lawfully entitled to all the premises described in his grant, and that all the previous requisites of the law had been complied with.

A patent issued under the later act, based upon an application for patent filed under the earlier, will convey such rights as are accorded under either act, provided, of course, that the locator has not in presenting

[18] Carson City G. & S. M. Co. v. North Star M. Co., 83 Fed. 658, 668, 28 C. C. A. 333, 19 Morr. Min. Rep. 118.

[19] 111 Fed. 817, 821, 49 C. C. A. 637, 21 Morr. Min. Rep. 591.

his diagram placed a limitation on his rights beyond which he could not go under either act.[20] Patents issued upon locations made prior to the act of 1872 usually contain a recital that they are issued under both laws.

ARTICLE V. LEGAL OBSTACLES INTERRUPTING THE EXTRALATERAL RIGHT.

§ 608. Classes of impediments interrupting the right of lateral pursuit.
§ 609. Prior appropriation by a regular valid location of a segment of the same vein without conflict as to surface area.
§ 610. Qualification of the doctrine that the extent of the extralateral right of different locators on the same vein is to be determined by priority of location.
§ 611. The encountering of a vertical plane drawn through a surface boundary of a prior grant, which grant did not in terms or inferentially reserve the right of underground invasion —Senior mining locations not of this class.
§ 612. Same—Prior agricultural grants.
§ 613. Same — Other classes of grants.
§ 614. Union of veins on the dip.
§ 615. Identity and continuity of veins involved in the exercise of the extralateral right.

§ 608. Classes of impediments interrupting the right of lateral pursuit.—There are conditions under which the pursuit of a vein on its downward course, outside of and beyond the vertical planes drawn through the side-lines, may be interrupted, although the surface conditions as to apex, course of the vein, and the boundary lines may approximate the ideal standard. The legal obstacles which may thus be interposed to obstruct the right are, generally speaking, referable to the necessity for recognizing prior grants and the

[20] New Dunderberg v. Old, 79 Fed. 598, 604, 25 C. C. A. 116; Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57, 22 Morr. Min. Rep. 575.

application of the maxim, "First in time, first in right."

We can conceive of three classes of such obstacles:—

(1) Prior appropriation by a regular valid location of a segment of the same vein;

(2) The encountering of a vertical plane drawn through a surface boundary of a prior grant, which grant did not in terms or inferentially reserve the right of underground invasion to the prospective proprietor of a lode location;

(3) The union on the dip of the vein of a junior with that of a senior locator.

§ 609. Prior appropriation by a regular valid location of a segment of the same vein without conflict as to surface area.—The principles involving the interruption of a junior extralateral right where it encounters that of a prior grant or location have been discussed in a previous section. It may be, however, expedient to state such principles in a more concise form. It is axiomatic that the government has no more power to grant the same thing twice than a private proprietor.[21]

It is bound by the same rules of good faith and good conscience which bind ordinary individuals. A patent issued for lands which have been previously granted, reserved from sale, or appropriated, is void.[22]

A valid mining location, perfected and maintained under the law, is a grant from the government,[23] and

[21] Fremont v. Flower, 17 Cal. 199, 79 Am. Dec. 123, 12 Morr. Min. Rep. 418.

[22] Morton v. State of Nebraska, 21 Wall. 660, 674, 22 L. ed. 639, 12 Morr. Min. Rep. 541; Davis v. Weibbold, 139 U. S. 507, 529, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; United States v. Winona & St. Paul R. R., 67 Fed. 948, 956, 15 C. C. A. 96.

[23] *Ante*, § 539.

the estate granted in the vein in depth, beyond the boundaries, is of the same dignity as that conveyed within the boundaries.[24]

A perfected valid lode location is, as a general rule, predicated upon the existence, within the defined boundaries, of some part of the apex of a discovered lode.[25] To the extent, at least, that this top or apex is included within vertical planes drawn through the surface boundaries, the lode is granted. If the position of the lode, with reference to the surface boundaries, is such that the locator is entitled, under the rules heretofore enumerated, to pursue the vein on its downward course beyond the vertical bounding planes, drawn through his side-lines, he is granted such segment of the lode in its entire depth as lies between vertical bounding planes drawn through his end-lines produced indefinitely in their own direction, subject only to the condition that no portion of such segment has been the subject of a prior grant which is still valid and subsisting. Let us illustrate this by the use of a diagram.

In figure 98 we have represented a lode, *x-x,* with a dip in the direction indicated by the arrow, passing on its onward course or strike through the respective locations of A, B, and C. Of these locations, B alone conforms to the ideal standard. Its end-lines cross the lode at right angles to its general course as it traverses the location. A and C each have parallel end-lines crossing the vein, but at obtuse or acute angles. As we have heretofore observed,[26] this is no objection to either the validity or regularity of the locations. The law does not require that end-lines shall be at right

[24] *Ante,* § 568.
[25] *Ante,* § 364.
[26] *Ante,* § 365.

angles to the course of the vein. It inflicts no punishment upon the locators of A or C for failure to so construct them. Individually considered in the eyes of the law, A and C are just as complete and regular locations as B. Each carves out a segment of the vein at the surface, fifteen hundred feet in length, included

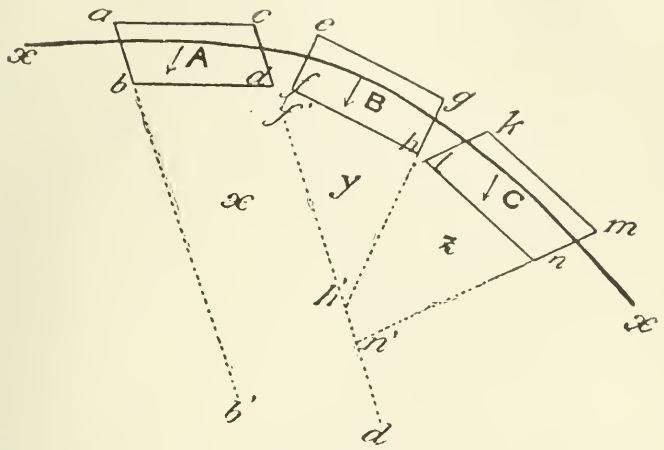


FIGURE 98.

within parallel end-lines, which are crossed by the lode on its onward course; and if found isolated and unaffected by rights asserted by neighboring locators, each would be entitled to that segment throughout its entire depth—that is, so much of the vein as is found between vertical bounding planes drawn through their respective end-lines produced indefinitely.

The priorities as to title are in the order named, A being prior in point of time to both B and C, and B being prior to C. When we speak of priority of title, we mean priority of location.

A junior locator may have a patent, while the senior's title rests in a perfected and subsisting location. Under such circumstances the patent has been

issued in subordination to the senior locator's rights. When the latter receives his patent, the title thus obtained will relate back to the date of his location.[27]

A, being the prior locator, has secured by his perfected location a grant to the segment of the vein found between vertical bounding planes drawn through his end-lines produced indefinitely in their own direction (*a-b-b', c-d-d'*)—that is, the segment *x*.

The title to this segment of the lode in its entire depth, beyond the vertical plane drawn through the side-line, *b-d*, has been severed from the title to the superjacent soil, and no subsequent grant, appropriation, or reservation, whether of the overlying surface or of any other part of the lode, can curtail or abridge any of A's rights, so long as his location is preserved in its integrity. He has the right to the pursuit of this segment in depth until he encounters some legal obstacle interrupting its further pursuit. A subsequent grant is not such a legal obstacle. B, the junior locator, cannot locate a continuation of the outcrop, and so construct the end-lines of his location that vertical planes drawn through them and their extension would intersect the vertical end-line planes of A, the senior locator, and deprive him of any portion of the segment *x*. B, by his junior location, obtains title to the segment *y*, and, if we are correct in the contention hereto-

[27] Stark v. Starrs, 6 Wall. 402, 18 L. ed. 925; Talbott v. King, 6 Mont. 76, 9 Pac. 434, 440; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119, 122; Last Chance M. Co. v. Tyler M. Co., 61 Fed. 557, 9 C. C. A. 613; St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 647, 26 L. ed. 875, 11 Morr. Min. Rep. 673; Kahn v. Old Telegraph Co., 2 Utah, 174, 11 Morr. Min. Rep. 645; Deno v. Griffin, 20 Nev. 249, 20 Pac. 308, 309; Eureka Case, 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578; Butte City Smokehouse Lode Cases, 6 Mont. 397, 12 Pac. 858, 860; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, 5 Pac. 570, 580.

For full discussion of the doctrine of relation, see *post*, § 783.

fore made,[28] the remainder of the underground segment of the vein within his extended end-line planes after they emerge from the conflict with A. C, who follows him, takes the segment *z*, with the remainder of the underground parts of the vein within his extended end-line planes after they pass the planes of conflict with A and B. As was said by the supreme court of the United States in the Argentine-Terrible case,—

> Assuming that on the same vein there were surface outcroppings within the boundaries of both claims, the one first located necessarily carried the right to work the vein.[29]

An inspection of the diagram (figure 67) presented in connection with a previous discussion of this case[30] forcibly illustrates the rule. The prior valid appropriation by the Adelaide of a portion of the apex, as indicated in figure 67, interrupted the extralateral right of the junior locators holding a portion of the apex of the same vein in the Camp Bird and Pine claims.

As was said by Judge Hawley, speaking for the circuit court of appeals, ninth circuit, in the Tyler-Last Chance case,—

> In cases of controversy, where the right exists under each valid location to follow the lode in its downward course, it necessarily follows that both locations cannot rightfully occupy the same space of ground; and in all cases where a controversy of this kind arises, the prior locator must prevail, precisely

[28] *Ante*, § 596.

[29] Argentine M. Co. v. Terrible M. Co., 122 U. S. 478, 484, 7 Sup. Ct. Rep. 1356, 30 L. ed. 1140, 17 Morr. Min. Rep. 109; Jefferson M. Co. v. Anchoria-Leland M. & M. Co., 32 Colo. 176, 75 Pac. 1070, 1072, 64 L. R. A. 925.

[30] *Ante*, § 587, p. 1335.

as in cases of like controversy between locations overlapping each other lengthwise on the course of the lode.[31]

A simplified diagram of the Tyler case will illustrate the doctrine, as applied to the hypothetical case under consideration.

Figure 99 is based upon the diagram appearing in connection with the opinion of the supreme court of the

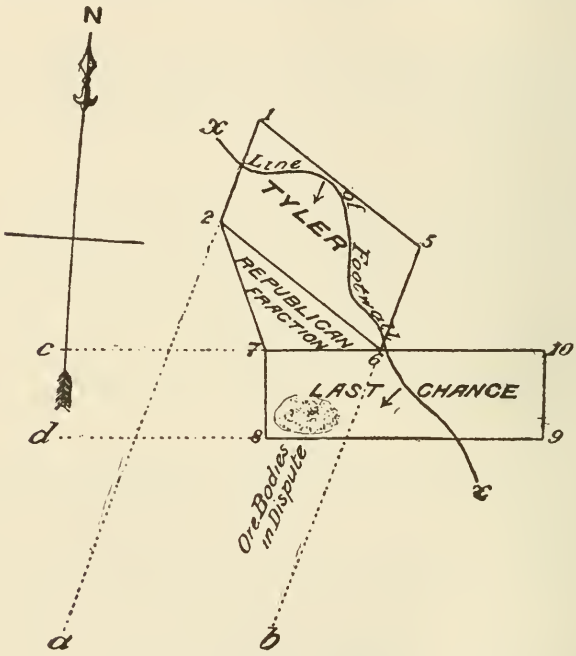


FIGURE 99.

United States.[32] A more elaborate representation of this case is found in figure 73, in connection with the

[31] Tyler v. Sweeney, 54 Fed. 284, 295, 4 C. C. A. 329; Jefferson M. Co. v. Anchoria-Leland M. & M. Co., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925.

[32] Last Chance M. Co. v. Tyler, 157 U. S. 684, 15 Sup. Ct. Rep. 733, 39 L. ed. 860, 18 Morr. Min. Rep. 205.

discussion in section 591. Figure 99 eliminates the triangular tract shown on figure 73 which involved a surface conflict between the Tyler and Last Chance claims, and presents the Tyler claim as patented, a claim regular in form, with the vein passing through two end-lines. The Last Chance presents a location with the vein crossing two side-lines. With the priority established in favor of the Tyler, there can be no question but that the owners of that claim would be entitled to the segment of the vein found within vertical planes drawn through the end-lines as produced (*1-2-a* and *5-6-b*). With the priorities established in favor of the Last Chance, and assuming that the owners of the latter claim have a right to produce their side-end-line planes westerly in the direction of *c* and *d*, respectively, of the correctness of which assumption there can be no doubt,[33] the extralateral right of the Tyler is interrupted when the vertical plane drawn through *10-7-c* is encountered (but if our previous contentions are sustained,[34] it may be resumed south of the Last Chance south plane, *9-8-d*). As was said in this case by the supreme court of the United States:—

> On the assumption that the action of the owners of the Tyler claim, in excluding from their application a portion of their claim, was legal, obviously the priority of location becomes a pivotal question. For while the disputed ore is on the dip of the vein within the extended vertical planes of the end-lines of the Tyler claim, it is also within the legal end-lines of the Last Chance claim and on the dip of the vein as it passes through that claim. Naturally, therefore, the controversy in the circuit court was upon the priority of location.[35]

[33] *Ante*, § 589; Tyler v. Sweeney, 79 Fed. 277, 24 C. C. A. 573.

[34] *Ante*, § 596.

[35] 157 U. S. 683, 687, 15 Sup. Ct. Rep. 733, 39 L. ed. 861, 18 Morr.

With respect to the rights of the Republican Fraction, with an assumed priority over the others, by reason of the form of the location, it has no extralateral right, as it was located under the act of 1872. This location, it would seem, covers only a part of the width of the apex as shown on figure 73.[36] If the "broad lode" doctrine announced by the circuit court of appeals in the King-Viola-San Carlos case is correct,[37] the Republican claim would, with priority in its favor, hold everything within its vertical boundaries, and the extralateral right of the Tyler would be interrupted whenever its end-line planes encountered the vertical planes of the Republican Fraction. If it covered no part of the apex of the vein, there would be no interruption of the extralateral right of the Tyler so far as the Republican Fraction is concerned, a subject discussed in the next section.

§ 610. Qualification of the doctrine that the extent of the extralateral right of different locators on the same vein is to be determined by priority of location.—What we have heretofore said upon the subject of prior appropriation has been based upon the assumption of the existence of regular valid locations—that is, locations each embracing within its respective boundaries some portion of the apex of the same vein, each having the right of extralateral pursuit, to some extent at least.

It does not necessarily follow, nor is it to be inferred from the authorities cited, that the existence of any portion of the apex of a vein within the boundaries

Min. Rep. 205; Jefferson M. Co. v. Anchoria-Leland M. Co., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925.

[36] Republican M. Co. v. Tyler M. Co., 79 Fed. 733, 25 C. C. A. 178.

[37] Fig. 61, p. 1313.

gives the owner of a prior location all of the vein which may be found within the vertical planes drawn through those boundaries. We have heretofore endeavored to show that according to the spirit and intent of the existing law the owner of a lode location is entitled to only so much of the vein on its downward course as he has apex within his claim, and that the vertical planes bounding this right must under all circumstances be parallel, or, at least, nondivergent in the direction of the dip.

What we now wish to establish is, that any portion of the lode lying outside of and beyond these vertical end-line planes, found underneath the surface of the prior location, will belong to a subsequent locator who, by a regular valid location, appropriates such part of the apex as is found outside of the boundaries of the first locator. That our meaning may be plain, let us again resort to the use of a diagram.

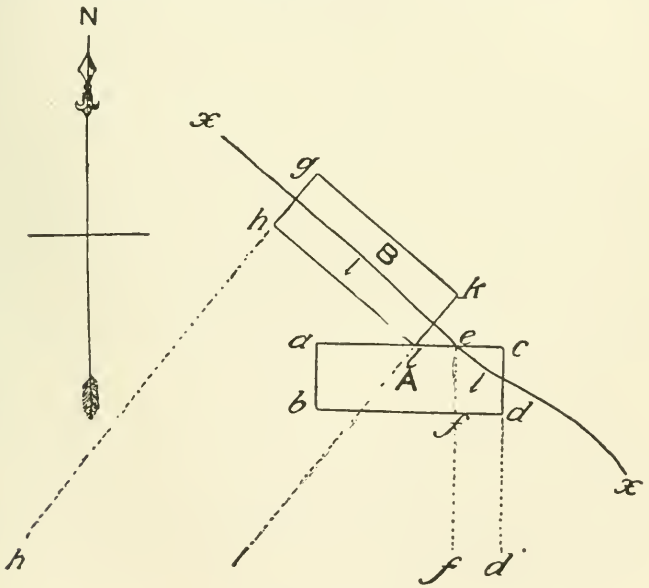


FIGURE 100.

Figure 100 represents two locations (A and B) on the same vein, *x-x*, A's being prior in point of time. As to A's location, the lode crosses one end-line, *c-d*, and a side-line, *a-e-c*, having within its boundaries, let us say, four hundred linear feet of the apex of the vein. If the views heretofore announced are sound,[38] A's extralateral right is defined by vertical planes drawn through *c-d-d'* and *e-f-f'*. What becomes of that portion of the vein lying underneath A's surface west of the vertical plane drawn through *e-f?* It may be admitted that, *prima facie*, it belongs to A. But when B makes his location, including the apex, as shown on the diagram, without in any way conflicting with A's surface boundaries, is his right of extralateral pursuit interrupted and abridged by a vertical plane drawn through A's north side-line, *a-e-c?* Such result would ensue if the vein crossed both side-lines in the manner shown in the Flagstaff-Tarbet, Argentine-Terrible, and King-Amy cases, *because* the side-lines in that class of cases perform *all* of the functions of *end-lines*. But in the case now supposed, the line *a-e-c* does not perform all of such functions, because its direction does not, under any circumstances, operate to determine the limits of the extralateral right. It stops the pursuit of the vein on its onward course. But this is true of any line crossed by a vein on its course. It is now well settled that A is, in the presence of junior locators, such as B, entitled to only so much of the vein in depth as he has apex within his claim,—i. e., four hundred feet. In other words, the segment of the vein underneath A's surface, lying west of the bounding plane drawn through *e-f*, is reserved by operation of law out of the grant to A, and B owns the segment of the vein within the bounding planes

[38] *Ante*, § 591.

g-h-h' and *k-l-l'*, although a portion of such segment underlies A's surface. This is an instance where the question of priority is immaterial.

> This consequence would follow, irrespective of the priority of the locations. It would depend on the question as to what part of the vein the respective locations properly cover and appropriate.[39]

The circuit court of appeals for the eighth circuit, in the case of the Colorado Central Consolidated Mining Company v. Turck,[40] held that the statute conferring the right to follow a lode outside of the side-lines of a location, when the top, or apex, of the lode lies within the boundaries of the location, does not, in terms or by necessary implication, limit the exercise of that right, especially where mining claims are involved, to cases where the adjoining claims are held under junior locations or patents, and in the Providence-Champion case,[41] Judge Hawley determined that the Champion, the junior locator, might follow that portion of the contact vein underlying its apex, underneath that part of the Providence surface lying beyond the planes determined by the court to be the end-line planes of the location. The court awarded to the junior apex locator that segment of the vein on its dip underlying the parallelogram *h-i-k-h'*, shown upon figure 81 (on page 1370), although such overlying surface was covered by the senior location and patent, which ruling was affirmed by the supreme court of the United States.[42]

[39] Flagstaff S. M. Co. v. Tarbet, 98 U. S. 463, 469, 25 L. ed. 253, 9 Morr. Min. Rep. 607.

[40] 50 Fed. 888, 2 C. C. A. 67; 54 Fed. 262, 4 C. C. A. 313.

[41] Walrath v. Champion M. Co., 63 Fed. 552, 558, 18 Morr. Min. Rep. 113; S. C., on appeal, 72 Fed. 978, 19 C. C. A. 323.

[42] Id., 171 U. S. 294, 311, 18 Sup. Ct. Rep. 909, 43 L. ed. 170, 19 Morr. Min. Rep. 410.

The contrary rule applied to the hypothetical case illustrated in figure 100 would result in giving to A practically fifteen hundred linear feet of the vein within the bounding planes drawn through his surface lines, with only four hundred feet of apex. If A had simply located the parallelogram *a-e-f-b*, he would acquire nothing as against B, because of the nonexistence of apex within his boundaries.[43] Should he be permitted to hold the segment of the vein underlying this parallelogram, as against the locator of the apex (B), simply because he included at the end of his claim a small portion of the apex cut by one end-line and one side-line? We think not, and in this we are supported by the decision of the supreme court of the United States in the Niagara-Black Rock case illustrated and discussed in section 591 (figure 75).

The decision of the supreme court of the United States in the Del Monte case,[44] where that court permitted the junior apex proprietor, the Last Chance, to take the vein on its downward course underneath the Del Monte, the senior claim, is, we think, applicable to the conditions here discussed, although the Del Monte held no part of the apex of the vein. We present this subject, however, in the next section.

§ 611. The encountering of a vertical plane drawn through a surface boundary of a prior grant, which grant did not in terms or inferentially reserve the right of underground invasion—Senior mining locations not of this class.—To say that the right to pursue a vein on its downward course, outside of and beyond vertical planes drawn through the lateral boundaries, is inter-

[43] *Ante*, § 364.

[44] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

rupted when a plane drawn through the surface boundaries of a prior grant is encountered, which grant did not in terms or inferentially reserve the privilege of underground invasion, is but the statement of a self-evident proposition. In such a case the segment of the vein underlying the surface of the prior grant has been conveyed, the title to it has passed out of the government, and the government cannot grant the same thing twice. This is elementary. The difficulty lies in determining to what extent, if any, this right of invasion is preserved. In other words, when and under what conditions is this underground segment of the vein deemed to be severed from the estate in the superjacent surface, so that a subsequent locator may acquire title to it by appropriating its apex?

As between mining proprietors—that is, where all the parties hold and claim under the mining laws of congress—it seems to be generally conceded that the apex proprietor, having a location in such form and with his vein in such a position within the boundaries of his location as to warrant the right of lateral pursuit under ordinary circumstances, may follow such vein in its downward course, into and underneath the surface of all other mining locations, either lode or placer, whether they be prior in time or subsequent, unpatented or patented. In other words, there is reserved, as a matter of law, out of every grant of an estate created under the federal mining statutes, all portions of veins underlying the location, which veins have their tops, or apices, outside of the located boundaries.

To state the proposition in another form: The apex lode proprietor with a regular valid location is granted the right to pursue his vein on its downward course into and underneath the land adjoining. His bound-

aries may, in like manner, be invaded by outside apex proprietors. The right is reciprocal. A placer locator takes, subject to this privilege of a lode proprietor, present or prospective, for the reason that the law under which he acquires the right to locate is found in the general body of the mining statutes, and must be construed in connection with the entire system, of which it forms but a part.

> A placer location is not a location of lodes or veins underneath the surface, but is simply a claim of a tract or parcel of ground for the sake of loose deposits of mineral upon or near the surface.[45]

The reservation of "known lodes" out of placers refers to such lodes as have their apices within the placer boundaries, and which are subject to appropriation *within* such boundaries, notwithstanding the existence of the placer location. A vein penetrating underneath a placer surface could not be so appropriated. Therefore, in dealing with placer locations and placer patents, it is not necessary that the underlying segment of the vein penetrating underneath the placer surface from an outside apex should be known to exist at the time of filing the application for a placer patent, in order to effect a reservation out of such patent. It is reserved by the theory of the law. It is severed from the public domain, and is subject to appropriation by the discoverer of the apex. It does not pass by the placer patent.

We think that the doctrine herein outlined finds ample justification in the authorities cited and reasoning applied in the preceding section. As was said by the circuit court of appeals, eighth circuit, in a case heretofore referred to:—

[45] Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 228, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

> The statute conferring the right to follow a lode outside of the side-lines of a location, when the top or apex of the lode lies within the boundaries of the location, does not, in terms or by necessary implication, limit the exercise of that right, especially where mining claims are involved, to cases where the adjoining claims are held under junior locations or patents, and we think we would not be justified in placing such a limitation upon the right by construction. The practice of the general land office for many years appears to have been opposed to the existence of any such limitation.[46]

And in another case between the same parties the same court reannounced the doctrine as follows:—

> If the patents were offered for the purpose of showing that they were older than the patent for the Aliunde claim, then the proof was immaterial, for the reason that the plaintiff's right to the lode in controversy did not depend upon the age of his patent, but upon the fact that the apex of the lode was within the surface boundaries of the Aliunde location.[47]

As we have heretofore noted, the supreme court of the United States has fully sanctioned the right of a junior apex proprietor with a regular valid lode location to take the segment of the vein lying between his extended end-line planes underneath the surface of the senior claim,[48] a question fully discussed in the preceding section.

[46] Colorado Cent. Cons. M. Co. v. Turck, 50 Fed. 888, 895, 2 C. C. A. 67. This case is commented on and a distinction is attempted in Jefferson M. Co. v. Anchoria-Leland M. Co., 32 Colo. 176, 75 Pac. 1070, 1074, 64 L. R. A. 925. As we have heretofore pointed out (§ 594), the result reached in the last-named case is opposed to the weight of authority.

[47] Colorado Cent. Cons. M. Co. v. Turck, 70 Fed. 294, 298, 17 C. C. A. 128.

[48] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

§ 612. Same—Prior agricultural grants.—Has the proprietor of a regular valid lode location the right to pursue his vein in depth, outside of his lateral bounding planes, into and underneath the surface of an agricultural grant, the title to which grant passed to the grantee prior to the discovery and location of the mining claim inclosing the apex? In other words, is the underground segment of the vein underlying such agricultural surface, the apex lying without it, and within public land, reserved by the law out of the agricultural patent, although at the time of the issuance of such patent such vein had not been discovered or located? In fact, we suppose a case where the existence of such vein was absolutely unknown.

The question has never been determined by the supreme court of the United States. It has been answered in the negative by Judge Sawyer, late circuit judge in the ninth circuit, in the case of Amador-Medean G. M. Co. v. South Spring Hill G. M. Co.,[49] the facts of which were as follows:—

On June 15, 1874, one Hammack entered at the local land office, and paid for, a tract of agricultural land, and received a certificate of purchase, which the court very properly treated as the equivalent of a patent, although such patent did not in fact issue until September 13, 1876. On July 18, 1876, one McKim located and acquired the right to a gold mining claim situated on lands adjacent to the tract embraced in Hammack's entry. McKim subsequently conveyed to the South Spring Hill Mining Company, and the title of Hammack passed ultimately to the Amador-Medean Gold Mining Company. The South Spring Hill in working its lode followed it on its downward course across the

[49] 13 Saw. 523, 36 Fed. 668.

vertical plane drawn through the boundary of the Hammack tract. The action was ejectment, to recover the possession of that portion of the vein lying underneath the surface of the agricultural patent. The patent contained, after the granting clause, the following:—

> And also, subject to the rights of the proprietor of a vein or lode, to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted as provided by law.

We may suggest that the insertion of this reservation is of no particular significance. Independent of the question of its proper interpretation, unless the law authorized it, it could neither enlarge nor abridge the rights conferred by the patent.

The supreme court of California, in referring to this exception in agricultural patents, says:—

> We have not been referred to any law authorizing the insertion of this clause, and it was held in Cowell v. Lammers, 10 Saw. 246, that a reservation of mineral land in an agricultural patent is void.[50]

We have heretofore discussed the reservation involved in Cowell v. Lammers.[51] A railroad patent had been issued with a clause excepting "mineral *land* should any be found to exist." The reservation usually found in agricultural patents refers to the right of the proprietor of a vein or lode to follow it downward underneath the patented agricultural surface. The supreme court of California did not purport to determine the invalidity of the reservation. It waived the question and held that the court below construed the clause as in any event only subjecting the patented

[50] Paterson v. Ogden, 141 Cal. 43, 99 Am. St. Rep. 31, 74 Pac. 443.
[51] *Ante*, § 161.

land to the right of the mining claimant to follow the vein on its downward course. The mineral claimant in that case was claiming a mining location situated within the patented agricultural surface.

The reservation referred to and criticised by the court had its origin undoubtedly during the time the act of 1866 was in force. Section 2 of that act[52] expressly provided that the land adjoining should be sold subject to this condition.

The patentee's right to follow the dip of his vein exists by virtue of the law, whether the express grant of such right is contained in the patent or not;[53] and conversely, if this right is reserved by the law out of a prior grant, it is immaterial whether any clause of exception or limitation is embodied in the patent. It is the law, and not the instrument of conveyance, which creates the reservation. As there is nothing cabalistic in the phraseology of the patent, it is an element of no moment, except in so far as it has a tendency to exhibit the rule of construction applied by the land department to the law it is called upon to administer. The question under consideration is to be solved without regard to the precise language embodied in patents.

Upon the conceded state of facts existing in the case of Amador-Medean v. South Spring Hill, as heretofore outlined, Judge Sawyer, in deciding in favor of the agricultural proprietor, said:—

> The only question is, whether, under the Revised Statutes, a party discovering and acquiring title by patent from the United States to a mineral gold-bearing vein or lode, having its apex within the land

[52] 14 Stats. at Large, ch. 262, p. 251.

[53] Doe v. Waterloo M. Co., 54 Fed. 935, 941; Montana O. P. Co. v. Boston & Montana C. & C. Co., 27 Mont. 288, 70 Pac. 1114, 1124; S. C., on rehearing, 27 Mont. 536, 71 Pac. 1005.

purchased, is entitled to follow the vein or lode down on its dip, across the boundaries of his own lands, into the agricultural lands of an adjoining proprietor who has the elder title? In my judgment, he clearly has not. . . . . By the entry and payment of Hammack, there being no known mine on the land, the entire interest to the center of the earth vested in him, and there was nothing left in the United States for a subsequent grant to other parties to operate upon. The only exceptions in the patents relate to easements and other prior rights already vested in other parties before the date of the entry, as was held in the case of Pacific Milling & Mining Co. v. Spargo.[54] No other exceptions are authorized by the statute to be inserted, and exceptions not so authorized, if inserted, would be void. Section twenty-three hundred and twenty-two of the Revised Statutes, relied on by defendant, does not authorize any such exception, and it only applies, at most, to public lands and to rights acquired to such lands before other parties acquire interests therein. It certainly does not apply to agricultural lands disposed of years, perhaps half a century, before by the government, and before any easement or other right has become vested in other parties. The United States can undoubtedly grant easements and other limited rights in any portion of the public lands, and subsequent purchasers must take them burdened with such easements or other rights; but when it has once disposed of its entire estate in the lands to one party, it can afterward no more burden it with other rights than any other proprietor of lands. The defendant acquired no rights in the premises in question under the section cited, or any other statute of the United States brought to the notice of the court, as against the prior grant under which plaintiff holds.[55]

[54] 8 Saw. 645, 16 Fed. 348, 16 Morr. Min. Rep. 75.

[55] This case was appealed to the supreme court of the United States. When it came on for argument, the attorney for the South Spring Hill

With all deference to the views of the distinguished jurist, we think that his opinion begs the question.

We may readily concede all that is said by him with reference to the subject of easements. We have followed his views in this behalf in a preceding section.[56] But we have also announced the view, based, as we think, upon sound reason, that the nature of the estate in the vein, created by a grant of the dip or extralateral right, is something more than a mere easement. It is a title in fee as to the vein granted.[57]

If the segment of the vein underlying the Hammack tract was in fact granted by the patent or by the certificate of purchase, which is the legal equivalent of a patent, it must be conceded that the subsequent location of the apex of the vein would not confer the right to enter underneath the surface of the agricultural entry in pursuit of the vein on its dip. Whether such patent conveyed such underground segment is to be determined, not from the inspection of the patent alone, but from a consideration of the state of the law as it existed when the certificate was issued; and this state of the law is not to be determined only from an examination of the particular statute under which the agricultural title was acquired, but from a fair consideration of the entire body of the federal laws providing for the sale and disposal of the public lands—laws which are

Co., plaintiff in error, called attention to the fact that since the decision in the circuit court the control of both corporations, parties to the suit, had come into the hands of the same persons. Therefore, without considering or passing upon the merits of the case in any respect, the appellate tribunal reversed the judgment, and remanded the case for further proceedings, "in conformity to law." South Spring Hill G. M. Co. v. Amador-Medean G. M. Co., 145 U. S. 300, 12 Sup. Ct. Rep. 921, 36 L. ed. 712.

56 *Ante*, § 531.

57 *Ante*, § 568, p. 1259.

essentially *in pari materia*. A statute must be construed with reference to the whole system of which it forms a part.[58]

> Where enactments separately made are read *in pari materia*, they are treated as having formed in the minds of the enacting body parts of a connected whole, though considered by such body at different dates and under distinct and varied aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws, and connect them in a symmetrical system.[59]

We have heretofore said that the act of 1866 was in effect a proclamation severing veins and lodes from the body of the public domain; that it was the announcement of a governmental policy whereby ledges within the earth were to be considered as distinct entities, and to be dealt with as such in administering the public-land system.

That this act was but a crystallization of the local rules and customs existing at the date of its passage has been abundantly established.[60] In construing a statute, aid may be derived from attention to the state of things as it appeared to the legislature when the statute was enacted.[61]

What was this "state of things" existing in the mining regions when congress first recognized these local rules and perpetuated the extralateral or dip right as

[58] Sutherland on Statutory Construction, § 284. See, also, Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 1048, 22 Morr. Min. Rep. 610.

[59] Sutherland on Statutory Construction, § 288.

[60] *Ante*, § 56.

[61] United States v. Union Pac. R. R., 91 U. S. 72, 79, 23 L. ed. 224; Platt v. Union Pac. R. R., 99 U. S. 48, 59, 25 L. ed. 424; Smith v. Townsend, 148 U. S. 490, 13 Sup. Ct. Rep. 634, 37 L. ed. 533; Johnston v. Morris, 72 Fed. 890, 896, 19 C. C. A. 229.

it was enjoyed under them? Judge W. H. Beatty, speaking for the supreme court of the state of Nevada, in an opinion rendered in July, 1866, sheds some light upon the subject:—

> Whilst we depart from the rules of the common law so far as to let the miner follow his lode of quartz wheresoever it may go, even though it runs under public land which was in the occupancy of another before the mine was located, on the other hand the occupier of the surface is equally entitled to protection in the use of that surface, if a miner having a senior location should, in course of time, be found to run under his improvements. The doctrine of the common law, that he who has a right to the surface of any portion of the earth has also the right to all beneath it and above that surface, has but a limited application to the rights of miners and others using the public lands of this state. Necessity has compelled a great modification of that doctrine. The departure from those old and established doctrines of the law will, doubtless, lead to many complications. To adhere to common-law rules on this subject is simply impossible. To attempt to carry out common-law doctrines on this point would either give all the houses in Virginia City to the mining corporations, or else all the most valuable mines to those occupying the houses. The well-established custom of miners, to locate veins of mineral, claiming to follow them with all their dips, spurs, and angles, without reference to the occupancy of the surface, has compelled a departure from the common-law rules.[62]

If it be true, and as we have shown in the preceding sections the courts have so decided, that the senior location may be invaded by the junior apex proprietor pursuing his vein on its downward course outside of his

62 Bullion M. Co. v. Croesus G. & S. M. Co., 2 Nev. 168, 178, 90 Am. Dec. 526, 5 Morr. Min. Rep. 254.

lateral boundaries, why should not the same rule be applied to senior agricultural grants? There is no particular magic in the position a given statute occupies in a cognate system.

As is said by Mr. Sutherland in his work on Statutory Construction,[63] it is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. Title thirty-two of the Revised Statutes of the United States embraces all legislation of a general and permanent character on the subject of public lands which was in force on the first day of December, 1873. It is subdivided into chapters, each dealing with a particular branch of the system, including the method of acquiring title to agricultural, mineral, townsite and other lands. Subsequent legislation on the same subject becomes a part and parcel of the system. It would be impossible to administer and execute these public land laws on intelligent or symmetrical lines unless the entire system is considered, and each part is construed in the light and according to the spirit and intent of the whole.

In comparing the federal land system and the governmental theories upon which it is based with those of other countries, we have noted[64] that, unlike the regalian system prevalent in England, France, Spain, and Mexico, a grant or conveyance by the United States carries all the minerals, unless reserved expressly or by implication in the law or instrument purporting to pass the title. The doctrine for which we are now contending is in harmony with this rule. We simply affirm that lodes or veins having their apices

63 § 288, and cases cited in note 5.

64 *Ante*, § 80, p. 120.

outside of the agricultural grant are, to the extent that such lodes or veins on their downward course underlie it, reserved by law out of such grant. Nor does this doctrine militate against the well-established rule of law that the patent is conclusive evidence of the character of the land. The land covered by an agricultural patent is conclusively deemed to be agricultural, but this does not necessarily imply that a lode under its surface, apexing outside of it, cannot be reserved without impeaching the patent and changing the legal character of the land. The two classes of grants may exist without conflicting, in a legal sense. As a matter of course, the agricultural grantee may insist upon the doctrine of lateral and subjacent support, as this is necessarily involved in the severance of the title to the underlying vein, and is one of the essential concomitants of the extralateral right.

The only case coming under our observation, other than the one passed upon by Judge Sawyer heretofore commented on, where this question was considered, was that of Wedekind v. Bell, decided by Judge Talbot at *nisi prius*—a case quite fully discussed in a preceding section.[65] The judge there held that a junior locator, with the apex of the vein outside of the prior patented agricultural land, might follow it underneath such land, declining to adopt the views of Judge Sawyer in the Amador-Medean case.

§ 613. **Same—Other classes of grants.**—It does not militate against the doctrine announced in the preceding section to admit that grants of all classes, the titles to which became vested prior to the passage of the act of 1866, form exceptions to the rule, for the simple reason that according to the state of the law thereto-

[65] *Ante*, § 596.

fore existing there was no recognized legislative declaration authorizing or sanctioning such a reservation. In the case of Mexican grants, we will concede that the rule does not apply, for two reasons: The titles to them originated prior to the enactment of any congressional laws, and their subsequent conveyance by the government to the confirmees was in fulfillment of treaty obligations. In addition to this, acts of congress providing for the settlement of private land claims are special in their nature, and form no part of the public land system. With reference to railroad grants and grants for educational purposes, the state of the law at the time the grants take effect, as to particular tracts, will control their administration.[66]

It may be said that this doctrine is radical, and that its application will carry us beyond the limits of judicial conservatism. This is of no moment if the rule be founded in logic and reason. It is upheld by many able and earnest men in the active walks of professional life, who are impressed with the conviction that the established policy of the federal government, traditional and legislative, on the subject of the dip or extralateral right has released us from the thraldom of the common law.

§ 614. **Union of veins on the dip.**—The last clause of section twenty-three hundred and thirty-six of the Revised Statutes provides that "where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including the space of intersection." This, of course, refers to a union on the dip.[67] We have heretofore fully considered the sub-

[66] *Ante*, §§ 141–159.

[67] Lee v. Stahl, 13 Colo. 174, 22 Pac. 436, 438, 16 Morr. Min. Rep. 152.

ject of cross-lodes such as intersect or cross on the strike—a class of cases provided for in the first clause of the section of the Revised Statutes referred to.[68]

The law defining the rights of the parties in cases of veins uniting on the downward course seems to be clear and unambiguous. The object of the statute was to supplement the provisions of section twenty-three hundred and twenty-two and to prescribe rules under which different locations by different proprietors should be held, and to determine the rights of such proprietors in case of intersecting veins.[69] When such an intersection is established, priority of location governs. The senior title takes the entire united vein below the line of junction.[70]

The problem is so simple that diagrams are hardly required to exhibit the practical application of the law. But even the statement of plain propositions may often be emphasized by apt illustration. The case of the Little Josephine Mining Co. v. Fullerton, considered by the circuit court of appeals for the eighth circuit,[71] affords us such an excellent opportunity of representing actual conditions to which the law has been applied that we consider it not altogether inappropriate to illustrate it.

[68] *Ante*, §§ 557–560.

[69] Stinchfield v. Gillis, 107 Cal. 84, 89, 40 Pac. 98, 99.

[70] Champion M. Co. v. Cons. Wyoming M. Co., 75 Cal. 78, 16 Pac. 513, 514, 16 Morr. Min. Rep. 145; Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. 540, 546, 18 Morr. Min. Rep. 113; Stinchfield v. Gillis, 96 Cal. 33, 30 Pac. 839, 840, 17 Morr. Min. Rep. 497; Little Josephine M. Co. v. Fullerton, 58 Fed. 521, 523, 7 C. C. A. 340; Roxanna G. M. Co. v. Cone, 100 Fed. 168, 171; Hickey v. Anaconda Copper Co., 33 Mont. 46, 81 Pac. 806.

[71] 58 Fed. 521, 7 C. C. A. 340.

Figure 101 shows, approximately, the relative position on the surface of the three locations involved, the veins dipping respectively in the direction of the arrows.

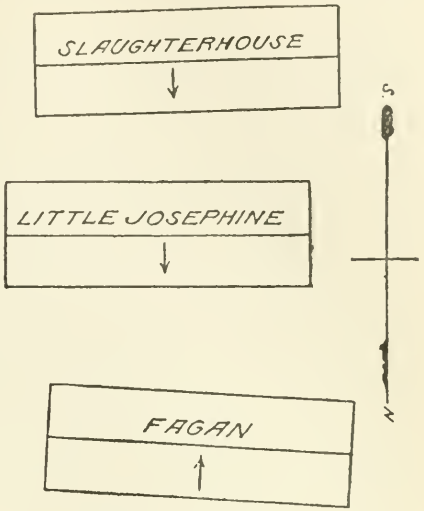


FIGURE 101.

Figure 102 is a cross-section, exhibiting the junction of veins underneath the surface.

As to the priorities, the Slaughterhouse was located in 1866 and patented in 1871. The Fagan was originally located in 1876, and an amended location was made in 1887. The Little Josephine's rights dated from 1877. As the Slaughterhouse and Little Josephine were both

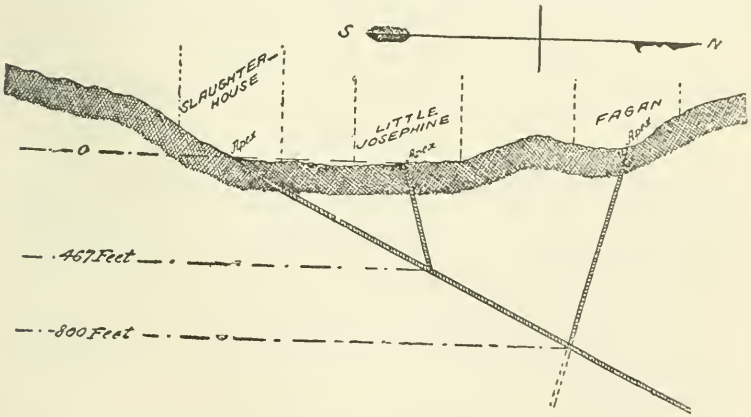


FIGURE 102.

held by the Little Josephine company, the court did not undertake to determine the priorities between the

Fagan and the Little Josephine. The Slaughterhouse, being the older location, took the entire vein below the junctions. With priorities in favor of the Fagan, the right of lateral pursuit of the Slaughterhouse would be interrupted at the point of junction. It would absolutely cease if the Slaughterhouse vein did not cross and continue below the line of junction. As it was, the extralateral right of the Fagan was lost at this point or line, unless it demonstrated that the vein passed through the Slaughterhouse and continued downward in the direction of the dotted lines. This fact was, as we are advised, ultimately established. resulting in giving the ore through the space of intersection from wall to wall to the Little Josephine company, and to the Fagan the right of way through the space of lode intersection.[72] These diagrams illustrate the rule more forcibly than pages of descriptive geology.

The embarrassment surrounding this class of cases arises from the difficulty of establishing the facts. If the union of the veins occurs at a point underneath the surface of neither of the contending parties, there are no presumptions indulged in. The burden of proof would naturally rest with the party having the affirmative of the issue.

§ 615. Identity and continuity of veins involved in the exercise of the extralateral right.—Whenever the extralateral right of an apex proprietor is challenged, he is called upon to establish,—

(1) The existence of an apex within his boundaries, to the extent necessary to cover the disputed segment of the vein;[73]

[72] See charge to jury quoted in Butte & Boston M. Co. v. Société Anonyme, 23 Mont. 177, 75 Am. St. Rep. 505, 58 Pac. 111, 116, approved with slight modification by the supreme court of Montana.

[73] As to what constitutes an apex, see *ante*, § 309. Also comments

(2) The identity and continuity of the vein from its top, or apex, within his own boundaries to the point in dispute.

As to the length of apex required to be shown, it is not necessary that it should be physically demonstrated that the vein passes through both, or even either, of the end-lines, so long as it appears that the course of the vein through the location is not such as prevents the exercise of the extralateral right. It will be sufficient if apex is shown to the extent that is necessary to cover the underground portion of the vein in dispute within the end-line bounding planes. If a lode proprietor with a location fifteen hundred feet long follows the vein on its dip underneath the surface of a parallel location seven hundred and fifty feet in length, apex need only be shown to the extent of the seven hundred and fifty feet, or to the extent that the claims parallel each other.[74]

Where a vein passes through an end-line of a claim and extends for a considerable distance in a general direction parallel to the side-lines of the location, there being no evidence to show that the vein departs through a side-line, the presumption will be indulged that the vein continues regularly on its course.[75]

Where a vein was shown to abruptly terminate against a "crossing," near the west end of the claim, but from the crossing easterly pursued a uniform

of United States supreme court in Mammoth v. Grand Central M. Co., 213 U. S. 72, 29 Sup. Ct. Rep. 413, 53 L. ed. 702; Lawson v. U. S. Min. Co., 207 U. S. 1, 8, 28 Sup. Ct. Rep. 15, 52 L. ed. 65.

[74] Hyman v. Wheeler, 29 Fed. 347, 355, 15 Morr. Min. Rep. 519.

[75] Argonaut Cons. M. Co. v. Turner, 23 Colo. 400, 58 Am. St. Rep. 245, 48 Pac. 685, 686, cited in Catron v. Old, 23 Colo. 433, 58 Am. St. Rep. 256, 48 Pac. 686, 687, 18 Morr. Min. Rep. 569. See Waterloo v. Doe, 82 Fed. 45, 55, 27 C. C. A. 50, 19 Morr. Min. Rep. 1; Wakeman v. Norton, 24 Colo. 192, 49 Pac. 283, 284.

course for a considerable distance practically parallel to the side-lines to a point within one hundred feet of the east end-line, it was said that the presumption was that the vein crossed the east end-line.[76]

While an apex proprietor pursuing his vein on its dip underneath adjoining lands is called upon to overcome certain legal presumptions flowing from surface ownership,[77] so far as the conditions within his own boundaries are concerned he is entitled to such presumptions of fact as rationally flow from other facts satisfactorily established.

The supreme court of Colorado has gone so far as to announce that when one has discovered a lode upon

[76] Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. 597, 602; affirmed on appeal, 83 Fed. 658, 28 C. C. A. 333, 19 Morr. Min. Rep. 118.

[77] Leadville M. Co. v. Fitzgerald, 4 Morr. Min. Rep. 380, Fed. Cas. No. 8158; Iron S. M. Co. v. Campbell, 17 Colo. 267, 29 Pac. 513, 515; Cheesman v. Shreeve, 37 Fed. 36, 37, 16 Morr. Min. Rep. 79; Cheesman v. Hart, 42 Fed. 98, 99, 12 Morr. Min. Rep. 263; Jones v. Prospect Mt. T. Co., 21 Nev. 339, 31 Pac. 642, 644; Bell v. Skillicorn, 6 N. M. 399, 28 Pac. 768, 771; Wakeman v. Norton, 24 Colo. 192, 49 Pac. 283; Lincoln Lucky & Lee M. Co. v. Hendry, 9 N. M. 149, 50 Pac. 330, 331; Parrot S. & C. Co. v. Heinze, 25 Mont. 139, 87 Am. St. Rep. 386, 64 Pac. 327, 329, 53 L. R. A. 491, 21 Morr. Min. Rep. 232; Maloney v. King, 25 Mont. 188, 64 Pac. 351; Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 59 Pac. 607, 615, 50 L. R. A. 209, 20 Morr. Min. Rep. 192; State v. District Court, 25 Mont. 572, 65 Pac. 1020, 1023; St. Louis M. & M. Co. v. Montana M. Co., 113 Fed. 900, 64 L. R. A. 207, 51 C. C. A. 530, 22 Morr. Min. Rep. 127; Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. Co., 114 Fed. 417, 52 C. C. A. 219, 22 Morr. Min. Rep. 104; Maloney v. King, 27 Mont. 428, 71 Pac. 469, 470; Montana Ore Purchasing Co. v. Boston & Montana Cons. C. & S. M. Co., 27 Mont. 536, 71 Pac. 1005, 1007; State v. District Court, 28 Mont. 528, 73 Pac. 230, 234; Heinze v. Boston & Montana C. & S. M. Co., 30 Mont. 484, 77 Pac. 421, 422; Grand Central M. Co. v. Mammoth M. Co., 29 Utah, 490, 83 Pac. 648, 667; Boston & Montana C. C. & S. M. Co. v. Montana Ore Purchasing Co., 188 U. S. 632, 638, 23 Sup. Ct. Rep. 440, 47 L. ed. 626; Lawson v. U. S. Min. Co., 207 U. S. 1, 8, 28 Sup. Ct. Rep. 15, 52 L. ed. 65.

the unappropriated public domain and has within the proper time, and in good faith, performed all of the subsequent acts essential to a valid location as provided by law, he is entitled to the presumption that his lode extends throughout the full length of the claim,[78] it having been established that the apex existed within the location, and its course shown to a slight extent.[79]

Many patents are issued which include a description of the lode line as surveyed, with reference to which the side-lines are constructed, and it is quite common for the official plat to show this line. Strictly speaking, in the nature of things, this is but the representation of the hypothetical course of the lode.

It is not for the government to show that the lode proceeds in a straight line. It must be presumed that such is its course and that it occupies a position in the center of the diagram filed, unless evidence be submitted showing a different direction.[80]

> The court cannot presume that the land department determined the course of the lode. The marking of an ideal line across the survey and diagram did not have the effect of putting a lode into the ground if there was no vein there.[81]

One whose territory is invaded has a right to show the actual course of the lode, independently of the lode-line established by the surveyor. The course of a vein

[78] Armstrong v. Lower, 6 Colo. 393, 399, 15 Morr. Min. Rep. 631.

[79] Id., on rehearing, 6 Colo. 581, 586, 15 Morr. Min. Rep. 458; Wakeman v. Norton, 24 Colo. 192, 49 Pac. 283, 286; San Miguel Cons. G. M. Co. v. Bonner, 33 Colo. 207, 79 Pac. 1025, 1027.

[80] Bimetallic M. Co., 15 L. D. 309; Instructions, 38 L. D. 40.

[81] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. 540, 552, 18 Morr. Min. Rep. 113; Grand Central M. Co. v. Mammoth M. Co., 29 Utah, 490, 83 Pac. 648, 668; Stevens v. Gill, Fed. Cas. No. 13,398, 1 Morr. Min. Rep. 576; Collins v. Bailey (Colo. App.), 125 Pac. 543, 548.

through a location is not the subject of adverse claim,[82] and outside claimants are not concluded, in this respect at least, by the issuance of the patent.[83]

In following his vein downward the apex proprietor must keep within it. He cannot crosscut underneath another's surface to reach the vein.[84]

The legal identity or continuity of a vein on its downward course, as well as on its longitudinal course underneath the surface of adjoining lands, presents at times the most serious questions encountered in the administration of the mining law. It is impossible to prescribe any definite rule as to what degree of continuity or identity in a legal sense the miner must establish when he invades property adjoining the location containing the apex of the vein. Each case presents its own peculiar features. Reports of adjudicated cases rarely present general discussions of this feature of the mining law, nor are the facts usually stated with such detail as to enable the practitioner to utilize the case as a precedent. The infinite variety of structural conditions encountered in the practical operation of mines renders it highly improbable that a case in one locality can be safely relied upon as a

[82] Beik v. Nickerson, 29 L. D. 662.

[83] See, also, Stevens & Leiter v. Williams, 1 McCrary, 480, Fed. Cas. No. 13,413, 1 Morr. Min. Rep. 566.

The case of Work M. Co. v. Doctor Jack Pot M. Co., 194 Fed. 620, decided by the circuit court of appeals of the eighth circuit, seems, to some extent at least, to be opposed to the doctrine of the text, and to sanction the rule that the patent when issued is conclusive evidence that the vein exists in the discovery cut or shaft and passes through both end-lines, in the absence of a showing that the vein passes through the side-lines. We shall have occasion to discuss the case in a subsequent section when dealing with the burden of proof in trespass cases.

[84] St. Louis M. & M. Co. v. Montana M. Co., 113 Fed. 900, 902, 51 C. C. A. 530; S. C., on appeal, 194 U. S. 235, 237, 24 Sup. Ct. Rep. 654, 48 L. ed. 953; *ante*, § 490a, Patten v. Conglomerate M. Co., 35 L. ed. 617.

precedent in a case arising in another place. The best that can be done in discussing this branch of the law is to present such cases as seem to clearly enunciate principles which may be considered of general application.

Of all the decisions of the courts which deal with the subject under consideration, that rendered by the supreme court of Montana in Butte and Boston Mining Company v. Société Anonyme des Mines de Lexington, speaking through Justice Hunt,[85] is the most instructive and valuable. We may select with advantage from the opinion of the court such expression of its views as seems to us of practical utility, commending the entire opinion as an exceedingly able one, and one reflecting much light on a difficult subject. Said the court:—

> The right of an apex proprietor to pursue a vein passing from his side-lines is dependent upon whether or not as a fact the part or mineral body of vein matter which lies outside of the perpendicular of the side-lines of his surface claim is so preserved in its identity with the lode inside that it is part of the same vein, the apex of which belongs to the surface owner. . . . .
>
> On principle the identity of the apex of a vein with its spurs or extensions must be the crucial test by which are to be fixed the proprietary rights to that vein and the mineral therein. . . . .
>
> The pursuit of the vein on its dip being, then, the right to be guarded, the identity of the vein pursued must be proven to make the right availing where it is contended the vein, after passing beyond the vertical planes drawn through the side-lines of the surface boundaries of the location in which rests the apex, penetrates soil the surface of which is embraced within another location. Identity must always exist. Were there any departure from this

[85] 23 Mont. 177, 75 Am. St. Rep. 505, 58 Pac. 111, 113.

rule the miner might secure the benefit of more than he discovered, which was never contemplated by the law. Identity in mineral deposit should have no significance not usual to identity of many other material things. It means the same thing or the same vein. It may be said to include a vein that is incessant. But a vein that is incessant or identical in its parts is not necessarily a vein which is continuous in the sense that the continuity or union of its parts is absolute and uninterrupted. In other words, though a continuity of vein does not preclude identity of vein, yet identity does not necessarily include continuity in the exact sense just referred to. "Law of continuity," says Webster's dictionary, "the principle that nothing passes from one state to another without passing through all the intermediate states." Speaking exactly by this definition, it would often be very difficult, if not impossible, for the challenged proprietor of a mineral vein to convince a jury of the continuity of the vein from one part to another, for there might not be continuity by actual contact of the parts or contiguity which the precise word may literally mean must exist. Were such a rule inexorable a failure of proof would not infrequently be brought about by the inability of the miner to prove continuity without transmission through intermediate states. The miner, therefore, might fall short of that exact measure of evidence required to establish a continuity of vein which excludes interruption between one and another part of the identical vein, and, judged by too closely interpreted significations the continuity would be lost; yet if he prove the identity of his vein by some incessant feature, in our judgment, the right to pursue the lode on its dip is his, and there should but remain the necessity of going to the surface limits to accurately adjudicate the lines defining the right to the vein so identified. . . . .

In this discussion, however, we do not mean to exclude the need of continuity sufficient to preserve

identity. The application of the rule of identity of vein should always be made so as to require the miner to trace his lode continuously if he depart beyond his extended side-lines. . . . .

The court quotes with approval the charge of Judge Hallett in Iron Silver Mining Company v. Cheesman, upheld by the supreme court of the United States,[86] and the following from the opinion of the latter court in that case:—

Certainly the lode or vein must be continuous in the sense that it can be traced through the surrounding rocks, though slight interruption of the mineral-bearing rock would not be alone sufficient to destroy the identity of the vein. Nor would a short partial closure of the fissure have that effect if a little farther on it occurred again with mineral-bearing rock within it.

The supreme court of Montana then continues:—

The true sense in which there must be a continuity of vein is therefore a qualified one and not an unqualified exact one, irrespective or independent of physical conditions found in mining. It may be said as a paraphrase of the decision cited, that identity is essential and the vein must be continuous, but its continuity may be interrupted, even to a closure of the fissure without destruction of the identity, provided the extent of the interruptions or closure does not prevent the tracing of the lode or vein through the fissure to be identical in its parts as a geological fact.

Identity may, of course, be proved by continuous development, although this is not always practicable, nor is it necessary.[87] It may be deduced from observed

[86] 116 U. S. 529, 532, 6 Sup. Ct. Rep. 481, 29 L. ed. 712.

[87] Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968, 969; Silver M. Co. v. Fall, 6 Nev. 454, 5 Morr. Min. Rep. 283.

facts in different portions of the mine. At the same time it is to be understood, in the absence of continuous development and exposure, the correlated facts exposed should logically lead to a conclusion of identity. Mere conjecture or intelligent guess would not be sufficient.[88] The incessant features of a given vein as exposed in underground works may ordinarily be presumed to continue throughout undeveloped sections, within reasonable limits, unless there is something in the exposed conditions which negatives such presumption.

The data, however, upon which this presumption is predicated must, of course, be physical facts shown to exist at the different points, which are to be correlated. The existence of such facts must be something more than a matter of mere conjecture. Basic data cannot be inferred. An illustration of this is found in the case of Collins v. Bailey, decided by the Colorado court of appeals,[89] the facts of which as they appeared to the court being illustrated on a cross-section, which we reproduce as figure 102A.

A superficial study of this cross-section leaves the impression that the vein shown in the shaft in the upper tunnel within the Grand Trunk belonging to the apex claimant is a part of the same vein shown in the raise in the lower tunnel, and the correlation of the two exposures by means of the dotted line shown on the figure might plausibly be inferred. But the facts stated in the opinion discredited the fundamental data on which the identity and continuity of the vein was predicated on the cross-section.

[88] Heinze v. Boston & Montana M. Co., 30 Mont. 485, 77 Pac. 421, 423.

[89] (Colo. App.), 125 Pac. 543.

In the first place, the engineer who made the cross-section indicated the position of the vein assumed to be in the shaft in the upper tunnel from the testimony

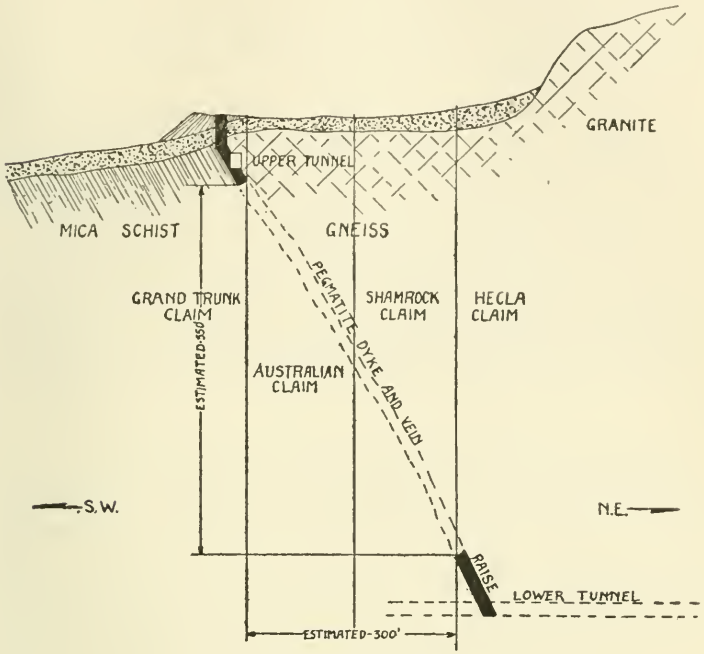


FIGURE 102A.

of one of the witnesses, an interested party. The workings in that section of the mine were filled with water and had not been seen by any other witness. The position of the lower tunnel was two hundred or three hundred feet away from the illustrated vein exposure on that level, and it was forced into the plane of the cross-section.

We do not intend to imply that all forcing of exposures into the plane of a cross-section is bad engineering practice. It is frequently necessary to pursue it, as it is rarely that all existing exposures which may

tend to establish identity lie in the same plane. But there must be ample justification for such forcing. The greater the distance the greater the possibility of discrediting the method. Sometimes exaggerated results favorable to a given structural theory are produced by this method, which have a tendency to seriously reflect upon the good faith of the party producing the section. It is much safer and more fair to the court to use for demonstration a series of cross-sections than to attempt a forcing process particularly where the exposures are remote. A hypothetical cross-section supplementing the series as illustration of a theory would not be objectionable. It would be far better to pursue this course than to have the infirmities of the cross-section exposed on cross-examination.

The vertical distance between the upper and lower exposures in the case under consideration was five hundred and fifty feet and six hundred and fifty-seven feet measured along the dotted lines connecting the claimed exposures, no development whatever having been made within this distance. The angle of declination in the lower workings was sixty-seven degrees; in the upper, sixty-five degrees. The vein, if extended upward from the lower workings on the angle of sixty-seven degrees, would not apex in the Grand Trunk, but in the Australian. The court pointed out the uncertainty of the information upon which the cross-section was based, and held that the deduction of claimed identity and continuity was the result of speculation and conjecture, characterizing it as a "wild guess."

In other words, the judgment or finding of identity rested "too largely upon speculation and too little

upon legitimate inferences of fact to be tolerated in a judicial proceeding."[90]

The court in the Collins-Bailey case, speaking of the instruction given by the court below, which was assigned in error, pointed out what seems to be a fair and reasonable requirement in cases of this character:—

> The instruction complained of was misleading, if not erroneous, in this case. It might have been allowable in a case where a vein had been opened and identified for substantial distances, and at points in close proximity, but even in that case it should have been qualified and amplified so as to permit a finding based only upon a state of facts sufficient to reasonably justify such a conclusion. It should have denied the right of the jury to guess, speculate or conjecture.

In regular fissure veins, in the absence of faulting, there is but little room for speculation on the subject of identity. Where veins have their individualizing characteristics, and when these are shown to be persistent by actual development, their existence in undeveloped sections may within reasonable limitations be inferred or established by correlation.

FIGURE 103.

A few conventional illustrations may be suggestive in connection with the discussion of the question of identity and continuity.

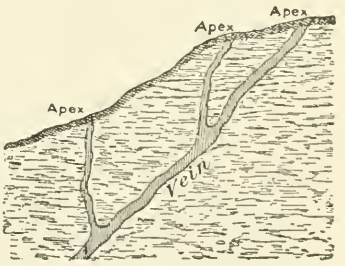


FIGURE 104.

If a vein "splits," or "forks," either on its

[90] Colorado Central Cons. M. Co. v. Turck, 50 Fed. 888, 895, 2 C. C. A 67.

strike, as shown on figure 103, or on its upward course, as shown on figure 104, the forks beyond or above the points of union may form distinct apices, subject to separate location, and thus constitute separate veins in the eyes of the law.

If the forking is downward, as shown on figure 105, there is but one controlling apex for all the branches, and, according to our view, the whole must be regarded as a single lode.

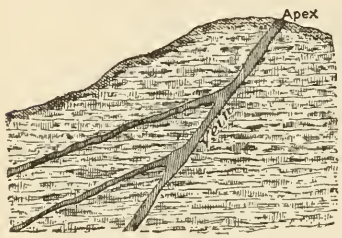


FIGURE 105.

In connection with a large complex lode, such as shown on figures 6, 7, 8, and 9 (on pages 650, 651), it is sometimes difficult to determine whether or not the various points of outcrop taken together constitute a single apex, and whether included masses of barren rock constitute "horses" belonging to one vein, or country rock in place separating distinct vein apices.

Most veins have small spurs and offshoots. Just where to draw the line or make the distinction between "spurs" and separate branch veins in a legal sense is a matter difficult to determine. Certainly no inexorable rule can be prescribed in advance of some authoritative decision on the subject, and we are aware of none.

In the tracing of a vein there are two important elements—the continuity of vein matter and the continuity of wall boundaries.

> With either of these things well established, very slight evidence may be accepted as to the existence of the other.[91]

[91] Iron S. M. Co. v. Cheesman, 116 U. S. 530, 536, 6 Sup. Ct. Rep. 481, 29 L. ed. 712; Collins v. Bailey (Colo. App.), 125 Pac. 543, 547.

A vein to be followed must be continuous only in the sense that it can be traced by the miner through the surrounding rocks.[92] Continuous ore is doubtless the best evidence, but it is not essential. Many veins carry only small "shoots" of ore, and the intervening spaces are represented only by a continuous fissure with or without gangue and gouge material.

A vein is by no means always a straight line, or of uniform dip, or thickness, or richness of mineral matter, throughout its course. The cleft, or fissure, in which a vein is found may be narrowed or widened in its course, and even closed for a few feet and then found further on, and the mineral deposit may be diminished or totally suspended for a short distance; but if found again in the same course, with the same mineral, within that distance, its identity may be presumed.[93]

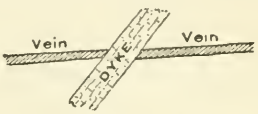


FIGURE 106.

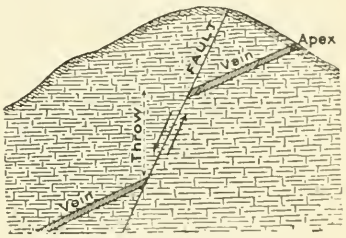


FIGURE 107.

But, as pointed out by the supreme court of Montana in the case heretofore referred to,[94] identity is not necessarily destroyed by intrusive dikes, faults, or casual displacements.[95]

92 Cheesman v. Shreeve, 40 Fed. 787, 17 Morr. Min. Rep. 260.

93 Iron S. M. Co. v. Cheesman, 116 U. S. 529, 534, 6 Sup. Ct. Rep. 481, 29 L. ed. 712.

94 Butte & Boston M. Co. v. Société Anonyme des Mines de Lexington, 23 Mont. 177, 75 Am. St. Rep. 505, 58 Pac. 111, 113.

95 Stevens & Leiter v. Williams, Fed. Cas. No. 13,414, 1 Morr. Min. Rep. 557; Grand Central M. Co. v. Mammoth M. Co., 29 Utah, 490, 83 Pac. 648, 676; appeal dismissed, 213 U. S. 72, 29 Sup. Ct. Rep. 413, 53 L. ed. 702.

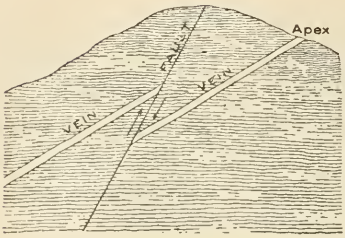


FIGURE 108.

Certainly in the case shown on figure 106 the intruding dike does not destroy vein identity, although it interrupts its continuity in a physical sense.

So in the case illustrated on figure 107, representing a very common occurrence, —viz., a "normal fault,"—the fault fissure having been formed after the vein, the hanging-wall of the fault plane has slipped or has been thrown downward relatively to the foot-wall, and has carried with it a part of the vein; or a "reversed fault," as represented on figure 108, where the hanging-wall of the fault plane has been thrust upward relatively to the foot-wall; or a fault with horizontal displacement, a "lateral heave," as shown in plan on figure 109.

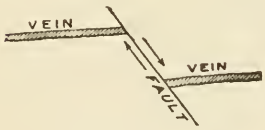


FIGURE 109.

FIGURE 110.

While it is at times difficult to establish the identity of the dislocated parts, yet it is often easily determined. For example, a portion of the vein material may be "dragged" along the fault fissure, as illustrated on figure 110, and furnish a continuous ore tracing. Again the foot and hanging walls of the vein may be of different material, as shown on figure 111, thus furnishing a definite indication of the fault; or there may be complex structure of the vein at the point of fault-

ing, as shown on figure 112, so as to identify the part thrown; or there may be changes of formation near at

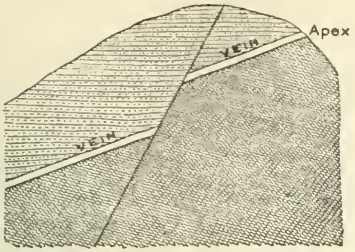


FIGURE 111.

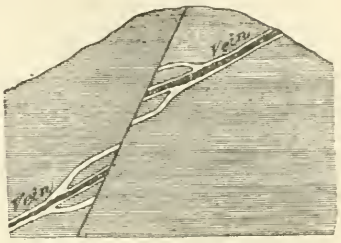


FIGURE 112.

hand and disclosed in the workings, as shown on figure 113, furnishing the information for the reconstruction of the section.

In all of these illustrated cases the continuity may be said to have been interrupted, but the identity of the part separated by faulting is easily established.

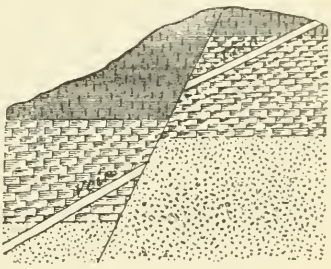


FIGURE 113.

Occurrences of the character illustrated on the foregoing figures seem to follow certain rules[96] recognized not only in treaties on dynamic geology but by the practical miner, who finds but little difficulty in ascertaining the position of the faulted part of his vein. But there are other conditions encountered which are much more complex, presenting complications which follow no definite rule,

[96] For rules for the determination of faults, see monograph of Mr. Francis T. Freeland, Trans. A. I. M. E., vol. xxi, p. 491.

where it is more difficult to determine the vexed question of identity.[97]

We may select as an illustration of complexities in vein structure without faulting the case of Pennsylvania Consolidated Mining Company v. Grass Valley Exploration Company, tried before and decided by Judge Morrow, in the circuit court of the United States, ninth circuit, northern district of California.[98]

The Pennsylvania company owned the Pennsylvania quartz mine, part of which is shown on figure 114, within which it claimed the apex of the Pennsylvania vein, to the extent, at least, as shown by the red line on the figure. On its downward course the vein passed underneath the surface of the patented agricultural land and townsite lots, held under a junior title by the Grass Valley Exploration Company. That company also owned the W. Y. O. D. mine and numerous other mining claims, which, with their agricultural and townsite holdings, practically surrounded the Pennsylvania quartz mine. The Grass Valley Exploration Company, by means of underground works extending from the W. Y. O. D. shaft, reached ore bodies underneath the Pennsylvania shaft, and the works of the two companies came together. Suits were brought by

[97] For instances and illustrations of faulting in the Golden Gate mine at Croydan, Queensland, see vol. 93, Mining and Scientific Press, p. 322. See, also, monograph of Mr. T. A. Rickard, then state geologist of Colorado, on the Enterprise mine, Rico, Colorado, Trans. A. I. M. E., vol. xxvi, p. 921. The contributions to the literature of faults appearing in the Transactions of the American Institute of Mining Engineers are numerous and of great value not only to the geologist but to the legal practitioner. A list of these, together with a bibliography on the subject of faults, may be found by consulting the index to the Transactions, vols. i–xxxv, and the indices to the later volumes.

[98] 117 Fed. 509, 22 Morr. Min. Rep. 306.

both parties to determine the ownership of the ore bodies underneath the agricultural and townsite lands. The burden of proving apex and identity and the conditions essential to the establishment of an extralateral right rested with the Pennsylvania company.[99]

Judge Morrow describes and analyzes the physical conditions at considerable length, and his opinion is comprehensively illustrated with diagrams. As heretofore observed, figure 114 shows the Pennsylvania location to the extent necessary for present purposes. The red line indicates the vein-apex as claimed by the

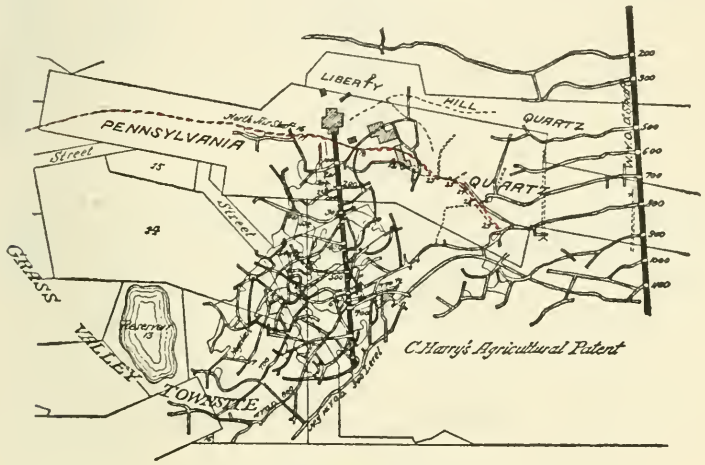


FIGURE 114.

Pennsylvania, crossing the north end-line and extending southerly as far as developed. The Pennsylvania end-lines are parallel. The vein is a gold-bearing quartz vein in grano-diorite, dipping about thirty degrees to the west.

[99] *Post*, § 866.

Figure 115 illustrates the contention of the Grass Valley company to the effect that the above claimed apex does not represent a single vein, but is composed of a series of apices of intersecting veins, colored green and orange on the diagram; that these apices prolonged

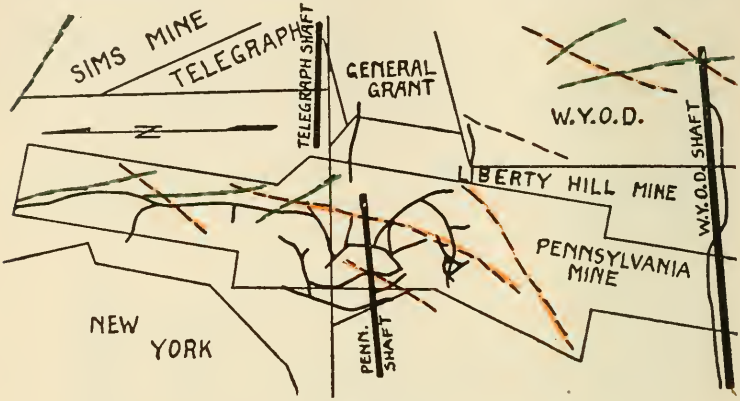


FIGURE 115.

would cross the side-lines of the location and convey no extralateral right to the ore bodies in dispute. This contention is specially illustrated on figure 116.

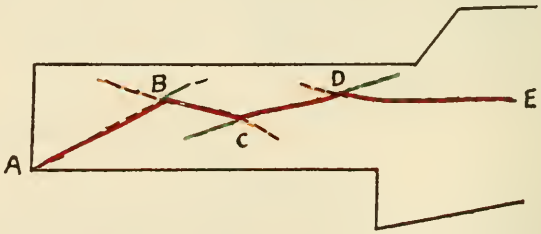


FIGURE 116.

The court, in speaking of the intersections claimed by the Grass Valley company, says:—

> In my judgment, the evidence demonstrated nothing more than a main vein with projected seams or spurs at these points. These seams or spurs were not traced for any distance, and were not found

crossing any side-line of the Pennsylvania claim. Whatever these seams or spurs may be called, or to whatever extent they may have been found, they did not destroy the continuity of the main vein.

The court then found that the apex was, as claimed by the Pennsylvania company, continuous "lengthwise of the claim to the extent and in the direction necessary to embrace within extended end-line planes the vein or lode in controversy."

The remaining question is, Has this vein or lode such a continuity or persistence in its dip or downward course as to include the ore deposit in dispute.

The position of the "ore deposit in dispute" is indicated by the network of underground workings to the west of the Pennsylvania location, as shown on figure 114.

The vein is comparatively simple at the surface, and so extends downward three hundred or four hundred feet on the incline. Thence downward it becomes more complex, consisting in certain sections of west and east dipping branches, as claimed by the Pennsylvania company, or of a series of independent veins, as claimed by the Grass Valley company. It was at these points of complication that the asserted continuity of the Pennsylvania vein was most strongly disputed.

FIGURE 117.

These complications, as described by the Pennsylvania company's witnesses, consisted in a stepping down of the vein from an overlapping to an underlapping west-dip fissure through a system of subordinate east-dip fissures, as illustrated on figure 117.

This is a vertical cross-section of one of the complications—west being from the right to the left side of the figure.

The court cites the testimony of one of the witnesses describing this section as follows:—

> If we follow the main fissure downward on its westerly dip, we find it flattening, weakening, and pinching out; but before pinching there fall from it a series of east-dip fissures which connect below with an underlapping west-dip fissure This underlap flattens, weakens and pinches out on its upward course, but on its downward course it strengthens

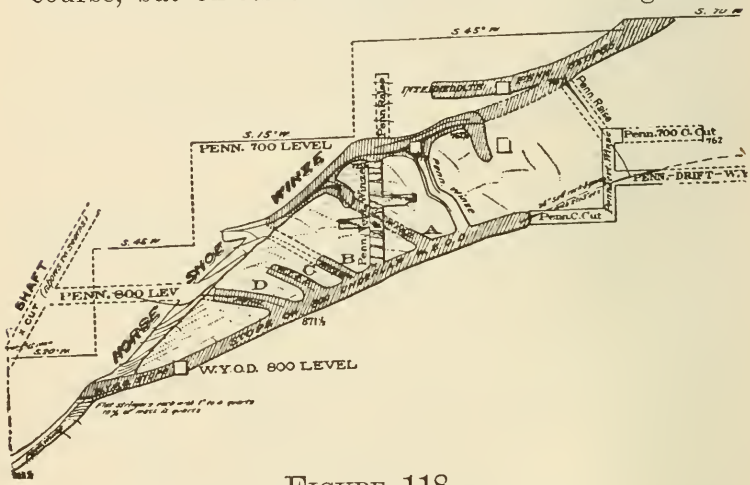


FIGURE 118.

> and becomes a strong ore-bearing vein. . . . . The channel . . . . is simply complicated by this network of fissures. Its continuity . . . . is not disturbed.

The most important of these complications is shown in the so-called Horseshoe-winze section (figure 118).

Here some of the east "dippers" have been stoped for ore. In the complications elsewhere the "stepping down" is through six or eight feet, but in the Horse-

shoe section it is through fifty feet or more of transversely fissured ground.

Figure 119, taken from one of the exhibits, gives a more complete vertical cross-section of the vein.

The Grass Valley company contended that there is no continuity of the Pennsylvania vein through the above complications; that these east-dip fissures intersect the west-dip fissures, and, extending in their own directions, constitute independent transverse veins, as illustrated on figure 120.

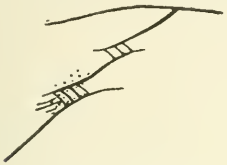


FIGURE 119.

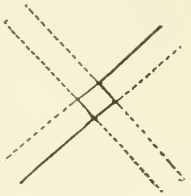


FIGURE 120.

The theory was advanced that the country rock was divided into rhombohedral blocks by means of a subdivisional joint-plane system, and that distinct veins were formed upon the various faces of the rhombohedrons. As to this rhombohedral theory, the court was of the opinion that it might account for some of the irregularities in the course of the vein shown in the underground workings. For the purpose of illustration, let us assume the subdivision of the earth's crust by means of a rhombohedral joint-plane system and add to it the assumption that there must be a great break or line of fissuring across the country to form an important vein. If the direction of the deep-seated forces were such as to produce the great fissure continuously along the line of one of these joint-planes we might have ultimately a fairly straight-line fissure vein. But if strains were such as to give the great

break a general course not so conforming, as on figure 121, there would doubtless occur a line of fissuring such as A-B, partly following joint planes, partly cutting across the rhombohedral blocks. Let there be a subsequent filling of the opening by a mineral stream coursing through it. In such case what constitutes the vein? Certainly not an original joint-plane, but the filling of the main break from A to B.

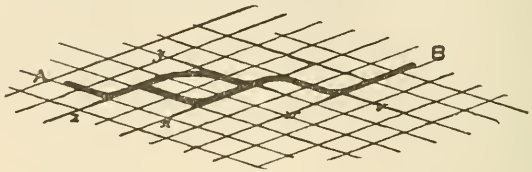


FIGURE 121.

The court found, however, that "the continuation of the east-dipping fissures has not been satisfactorily established at any point where the two veins come together"; also, that the above theory is not in conflict with the claim of continuity of the Pennsylvania vein through the complications.

By a circuitous route the vein was followed continuously downward on a westerly dip from the apex to the lowest level without the intervention of any complication. Both to the north and to the south of the Horseshoe winze the vein was so traced from the seven-hundred-foot level to the bottom level,—i. e., from a level above the Horseshoe complication to a level below it. The court considers that the bearings of these facts were not overcome by evidence of complications elsewhere, and says:—

> To my mind, the most conclusive fact establishing the continuity of the Pennsylvania vein is this fact,—that the vein can be followed as a dominant persistent vein from the surface through continuous stopes down to the lower workings of the mine.

In the northwesterly portion of the mine, there is a marked divergence of the strike of the vein in depth from the course of the apex. The Grass Valley company urged this as an objection to the claim of identity and continuity. But the court says:—

> This fact would be of some importance if the vein was an ideal one, maintaining a uniform strike and dip throughout its entire course. But it is not an ideal vein, and there are very few such to be found. . . . . This twisting or turning of the vein is accounted for . . . . by the folding of the rock under pressure and contraction. . . . . This objection to the Pennsylvania vein is, in my judgment, without any force. . . . .
>
> It follows from these considerations that I am of the opinion that the Pennsylvania company has established its right to all the ore bodies and sections of the mine in dispute.

The distinction between the character of complications existing in the Pensylvania case and the occurrence of faulting and normal displacements previously illustrated is manifest. The difficulties of determining identity increase as complexities are multiplied, and necessarily each case must be determined upon a consideration of the peculiar facts therein developed.

Speaking of the difficulties surrounding this class of cases, Judge Hawley has pertinently said:—

> In all controversies concerning the identity of ore bodies found on different levels at various depths beneath the surface there is always room for a wide divergence of opinion among men of equal credit and experience as miners. The absolute truth is often difficult to ascertain, except in cases where connections are made between the different bodies of ore found on different levels. . . . . A wide latitude is always permissible for the purpose of ascertaining

the reasoning upon which the conclusions of witnesses are based as well as their general knowledge of the ground, their experience and observations, and their qualifications as practical miners or experts derived from years of experience in the particular district where the ore bodies in question are found.[100]

Article VI. Conveyances Affecting the Extralateral Right.

§ 616. Introductory.
§ 617. Conveyance of the location containing the apex of the vein conveys the extralateral right.
§ 618. Extent of extralateral right passing by conveyance of part of the location.
§ 618a. Effect on extralateral right where owner of the location conveys the adjoining ground into which the vein penetrates on its downward course.
§ 618b. Effect of conveyances of segregated parts of unpatented claims.

§ 616. Introductory.—It is not our purpose to enter into a general discussion of the operative force of or-

[100] Justice M. Co. v. Barclay, 82 Fed. 554, 556, citing Overman S. M. Co. v. Corcoran, 15 Nev. 153, 1 Morr. Min. Rep. 691; Book v. Justice M. Co., 58 Fed. 106, 111, 17 Morr. Min. Rep. 617; Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. 540, 544, 18 Morr. Min. Rep. 113; Columbia Copper M. Co. v. Duchess M. & M. Co., 13 Wyo. 244, 79 Pac. 385, 387.

In the case of Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57, 22 Morr. Min. Rep. 575, the owner of a claim overlying the dip of a vein had excavated the vein so that there was a void between the overlying apex in his adversary's ground and the unmined parts of the vein. He had the temerity to insist that this artificial vacancy created by himself destroyed the continuity of the vein so as to deprive the apex proprietor of his right to follow his vein downward. The court seems to have taken the contention seriously. Its ruling was, "that a portion of the vein has been removed does not change the fact that the vein below the point of such removal is the same as the one apexing in appellee's claim."

dinary conveyances of land. We may accept without comment or elaboration the familiar rule of the common law stated by Blackstone, that when one conveys land, that term

> includes not only the surface of the earth but everything under it or over it. And therefore if a man grants all his lands he grants all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. From the operation of conveyances of this nature by individuals, the minerals of gold and silver are not reserved, unless by express terms. They pass with the transfer of the soil in which they are contained.

In other words, at common law a deed of real estate conveys all beneath the surface unless there be some words of exception or limitation.[1]

But if we except royal mines in crown grants, which under the regalian doctrine were always reserved,[2] there was no implied reservation at common law attaching to land grants. Nor was there anything in the system of land laws, except perhaps under the local customs in Derbyshire,[3] resembling the extralateral right granted to lode locators under the federal laws. While, as we have heretofore observed,[4] the grant of the extralateral right sanctioned by these laws is analogous to a common-law severance and not in contravention of such law, it is quite manifest that the conditions and governmental policy in dealing with public lands in the United States or in such states and territories as are subject to the federal mining laws, so far as the mining industry is concerned, are quite

[1] Montana M. Co. v. St. Louis M. & M. Co., 204 U. S. 204, 217, 27 Sup. Ct. Rep. 254, 51 L. ed. 444.

[2] *Ante*, § 3.

[3] *Ante*, § 9, p. 18.

[4] § 568.

different from the conditions and policy existing in England.

So in interpreting a conveyance of a tract of land situated in the precious metal bearing states and territories elements are to be considered which did not exist at common law. The courts in construing deeds and instruments purporting to deal with lands which were originally public lands are called upon to consider the nature and character of the property involved, the muniments of title under which they are held, and all parts of the cognate system of federal legislation dealing with the primary disposal of the soil.

As was aptly said by Chief Justice Beatty, now chief justice of California, but then sitting on the supreme bench of the state of Nevada:—

> The doctrine of the common law, that he who has a right to the surface of any portion of the earth has also the right to all beneath and above that surface, has but a limited application to the rights of miners and others using the public lands of this state. Necessity has compelled a great modification of that doctrine—to adhere to the common-law rules on this subject is simply impossible. To attempt to carry out common-law doctrines on this point would either give all the houses in Virginia [City] to the mining corporations or else all the most valuable mines to those occupying the houses. The well-established custom of miners to locate veins of mineral, claiming to follow them with all their dips, spurs, and angles, without reference to the occupancy of the surface, has compelled a departure from common-law rules.[5]

So in interpreting conveyances of property situated in the precious metal bearing states "the language

[5] Bullion M. Co. v. Croesus M. Co., 2 Nev. 168, 90 Am. Dec. 526, 5 Morr. Min. Rep. 254.

used is to be construed with reference to the peculiar property about which the parties were contracting."[6]

This general principle is recognized by the supreme court of the United States in Montana M. Co. v. St. Louis M. & M. Co.,[7] although, as we shall see later, the court held that these considerations were not sufficient to overcome the effect of the deed in question, owing to the fact that the instrument in terms purported to convey "all the mineral therein contained."

It is our purpose to briefly analyze and illustrate the cases to which these rules have been applied, and note their practical application to a variety of conditions arising out of conveyances affecting the extralateral right.

§ 617. Conveyance of the location containing the apex of the vein conveys the extralateral right.—Under the existing mining laws a locator acquires a tract of ground the boundaries of which are marked upon the surface. If within the tract so marked there is discovered a vein the apex of which passes through two parallel lines or through one end-line and a side-line, or in any manner so as to convey an extralateral right according to the principles heretofore discussed, the locator becomes the owner of all such surface, and of all veins which have their tops, or apices, therein throughout their entire depth between the extended end-line planes of the location, although such veins on their downward course pass out of and beyond vertical planes drawn through the side-lines. The owner-

[6] Richmond M. Co. v. Eureka M. Co., 103 U. S. 839, 846, 26 L. ed. 557, 9 Morr. Min. Rep. 634; Montana M. Co. v. St. Louis M. & M. Co., 102 Fed. 430, 432, 42 C. C. A. 415, 20 Morr. Min. Rep. 507; Montana O. P. Co. v. Boston & Montana Cons. C. & S. Co., 27 Mont. 536, 71 Pac. 1005, 1008.

[7] 204 U. S. 204, 217, 27 Sup. Ct. Rep. 254, 51 L. ed. 444.

ship of the outside parts of these veins flows by virtue of the statute from the ownership of the surface embracing the apex. It would flow from the patent when issued under the statute, regardless of any express grant thereof.[8]

The outside parts of the vein are just as much a part of the location as if entirely within its surface lines.[9]

As the statute is a muniment of the title, by which the extent of the grant is to be measured, a conveyance of the location, either by name or by description of its surface boundaries, would necessarily carry with it such portions of the vein as in contemplation of the law formed a part of the location, without the necessity of making a specific grant of the extralateral right. The supreme court of the United States has said that it is probably not necessary to specify extralateral rights in order that a conveyance of a mining claim be operative to transfer them.[10] In the early period of mining in the west, at a time when no serious significance attached to surface boundaries, when the vein was the principal thing sought and obtained by location, and the surface was a mere incident, it was customary to insert in a conveyance of a mining claim, after the *habendum* clause, the phrase "together with all the dips, spurs, angles, and variations,"[11] or lan-

[8] Doe v. Waterloo M. Co., 54 Fed. 935, 941; Montana O. P. Co. v. Boston & Montana Cons. C. & S. Co., 27 Mont. 288, 70 Pac. 1114, 1124; S. C., on rehearing, 27 Mont. 536, 71 Pac. 1005, 1008.

[9] Tyler M. Co. v. Last Chance M. Co., 90 Fed. 15, 21, 32 C. C. A. 498. See, also, Bunker Hill & Sullivan M. & C. Co. v. Shoshone M. Co., 33 L. D. 142; Central Eureka M. Co. v. East Central Eureka M. Co., 146 Cal. 147, 79 Pac. 834, 836, 9 L. R. A., N. S., 940; affirmed on appeal, 204 U. S. 266, 27 Sup. Ct. Rep. 258, 51 L. ed. 476; Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57, 58, 22 Morr. Min. Rep. 575.

[10] Montana M. Co. v. St. Louis M. & M. Co., 204 U. S. 204, 217, 27 Sup. Ct. Rep. 254, 51 L. ed. 444.

[11] See remarks of the court as to this custom in Montana M. Co.

guage of similar import, which custom is still followed in certain states and territories. Such a clause is superfluous and would not tend to strengthen a conveyance describing the location by name or by metes and bounds. A conveyance of the latter class would suffice to pass everything which under the law pertained to the location. This is by reason of the nature and character of the property which is the subject of the transaction. No such effect could be given to such a conveyance at common law, simply for the reason that no such kind of property was recognized by that law.

An illustration of the application of this rule is found in the case of Eureka Consolidated Mining Company v. Richmond Mining Company,[12] the facts of which are illustrated on figure 54, which is herewith reproduced.

In that case a controversy arose between the Eureka company, owning the Champion, At Last, Margaret, and other claims, and the Richmond company, owning the Richmond, Tip Top, and Look Out, over their respective rights on the vein,—the apex of which in its course was found to traverse the claims of both companies. A compromise agreement was entered into whereby a line was established between them (the hatched line X-W on figure 54, and reaching the northwest corner of the Nugget).

The Richmond company conveyed to the Eureka company everything on the southeasterly side of the line and all its title "in and to all ores, precious metals, veins, lodes, ledges, deposits, spurs, and angles, *on, in, or under* said land or mining ground or any part thereof." The Eureka company conveyed to the

v. St. Louis M. & M. Co., 204 U. S. 204, 217, 27 Sup. Ct. Rep. 254, 51 L. ed. 444.

12 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578.

Richmond everything on the northwesterly side of the line, the conveyance containing a similar clause.

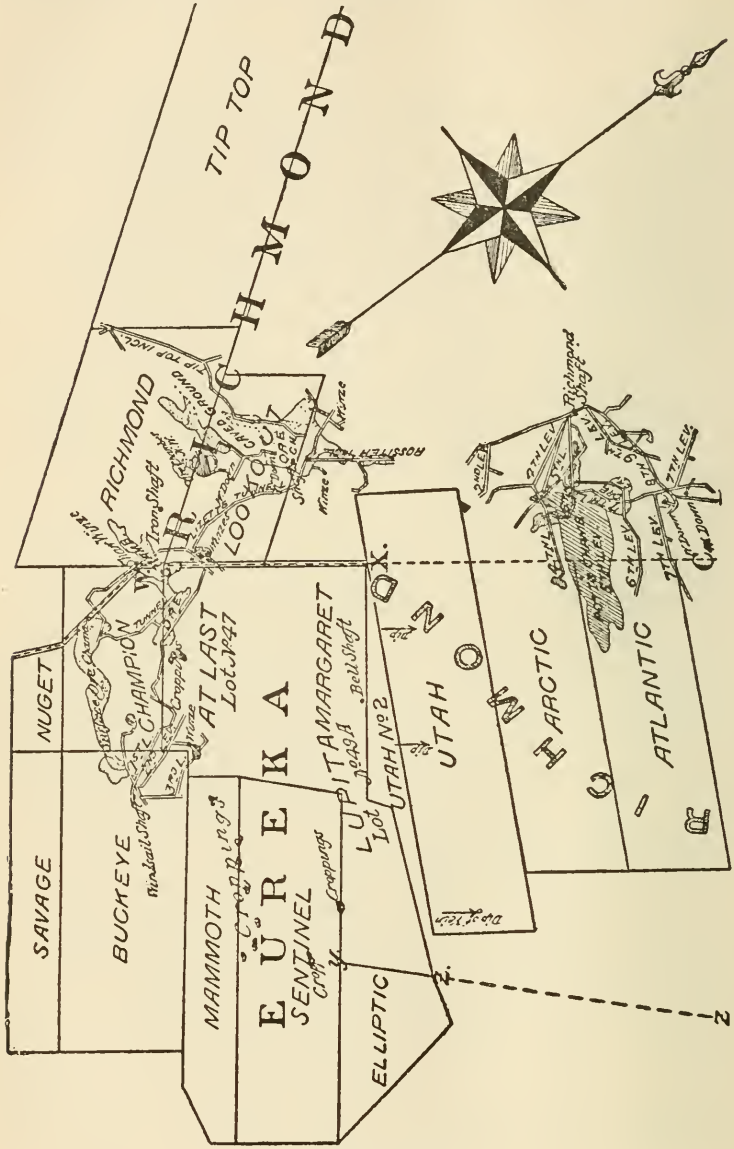


FIGURE 54.

Subsequently a dispute arose as to the ownership of the Pott's Chamber, an extensive ore body found to be on the vein outcropping in the claims of both parties, which was not intersected by the vertical plane drawn through the compromise line. The Richmond company contended for the common-law rule of construction, which would limit the operation of the conveyance to such ores as were found underneath the surface of the Eureka claims, southeast of the compromise line, terminating at X, and that the court could not extend the line W-X in the direction of C, for the purpose of taking in any part of the Pott's Chamber. The Eureka company contended that the dividing line, having been established crossing the lode at the surface, considering the nature and character of the property, the conveyance carried the extralateral right, and that the compromise line should be extended indefinitely in the direction of the dip.

In upholding the latter contention, Judge Field, sitting as circuit justice with Judges Sawyer and Hillyer, said:—

> The line thus designated [the compromise line], extended in a direct line along the dip of the lode, would cut the Pott's Chamber and give the ground in dispute to the plaintiff. That it must be so extended necessarily follows from the character of some of the claims it divides. As the Richmond and the Champion were vein or lode claims, a line dividing them must be extended along the dip of the vein or lode, so far as that goes, or it will not constitute a boundary between them. All lines dividing claims upon veins or lodes necessarily divide all that the location carries and would not serve as a boundary between them if such were not the case.[13]

[13] Eureka M. Co. v. Richmond M. Co., 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 573.

This received the approval of the supreme court of the United States.[14] This case has been followed in several later ones involving analogous questions, to be considered in succeeding sections.

§ 618. Extent of extralateral right passing by conveyance of part of the location.—It frequently happens that mining claims are divided and conveyances made of a part of the location. This class of instruments is quite often, if not usually, the result of compromises arising out of adverse claims to conflicting surface locations. The Eureka-Richmond case discussed in the preceding section belongs to this class.

In the case of Montana Mining Company v. St. Louis Mining Company,[15] the conveyance in question was executed under a state of facts which are illustrated on figure 122. The St. Louis company owned the St. Louis, the prior claim. The Nine Hour was owned by the Montana company. The St. Louis company applied for a patent, and included a part of the Nine Hour surface, resulting in an adverse suit. This was compromised, the Montana company withdrawing its adverse, and the St. Louis company agreeing to convey after patent the thirty-foot strip A-B-C-E. After patent issued the St. Louis company refused to convey. A suit for specific performance was brought, resulting in a decree directing the execution of the conveyance.[16]

The conveyance as executed to the Montana company described the thirty-foot strip by metes and bounds,

[14] Richmond M. Co. v. Eureka M. Co., 103 U. S. 839, 846, 26 L. ed. 557, 9 Morr. Min. Rep. 634.

[15] 102 Fed. 430, 42 C. C. A. 415.

[16] Montana M. Co. v. St. Louis M. & M. Co., 20 Mont. 394, 51 Pac. 824, 19 Morr. Min. Rep. 218; S. C., on writ of error, St. Louis M. & M. Co. v. Montana M. Co., 171 U. S. 650, 19 Sup. Ct. Rep. 61, 43 L. ed. 320.

"together with all the mineral therein contained, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver-bearing quartz rock and earth therein."

Subsequently a controversy arose over certain ore bodies found underneath the surface of the thirty-foot strip, the St. Louis company contending that they belonged to a vein (the secondary, or Drum Lummon vein, shown on figure 122) having its apex within the

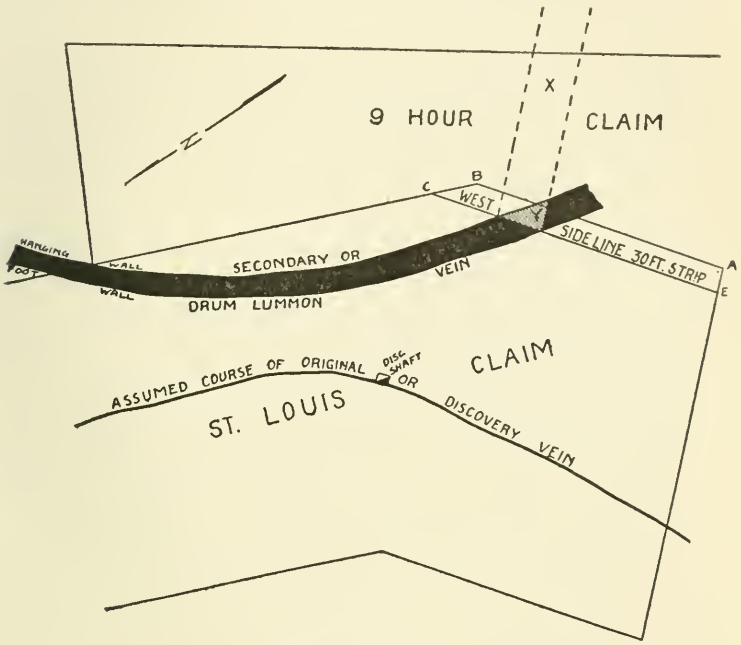


FIGURE 122.

St. Louis claim. The Montana company claimed that the ore bodies passed to it under its deed to the thirty-foot strip. The circuit court of appeals sustained the contention of the St. Louis company, basing its conclusions on the following grounds:—

In interpreting the conveyance in question, regard must be had not only to its terms, but to the subject matter involved and the surrounding circumstances. "The language used is to be construed with reference to the peculiar property about which the parties were contracting." Richmond M. Co. v. Eureka M. Co., 103 U. S. 846. . . . . If the adverse action which was brought by the owners of the Nine Hour claim had gone to trial, and had resulted in a judgment fully sustaining their contention, the result would have been to fix a surface line of division between the two claims without affecting rights to ores beneath the surface otherwise than as they are controlled by the mining laws of the United States. The owners of the St. Louis claim would still have retained the right to follow their vein extralaterally on its dip beneath the surface of the strip of land which was the subject of the conveyance. . . . . It is not to be supposed that the owners of the St. Louis claim intended by the compromise contract not only to surrender the whole of their contention concerning the true location of the boundary line, but also to divest their claim of its extralateral rights,—rights that had not been in litigation, and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit. The use of the words "together with all the minerals therein contained" is not sufficient.[17]

The supreme court of the United States, however, reversed this ruling, holding that the language in the conveyance heretofore quoted must be given effect, and awarded the ore bodies in dispute to the Nine Hour claim.[18] At a later date a controversy arose

[17] Montana M. Co. v. St. Louis M. & M. Co., 102 Fed. 430, 432, 42 C. C. A. 415, 20 Morr. Min. Rep. 507; S. C., on cross-writ of error, 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725, 21 Morr. Min. Rep. 57.

[18] Montana M. Co. v. St. Louis M. Co., 204 U. S. 204, 27 Sup. Ct. Rep. 254, 51 L. ed. 444.

between the same parties over the ore bodies, part of the same vein, lying underneath the Nine Hour surface east of the east compromise boundary (e. g., the point x on figure 122), which had been extracted by the Montana company while the parties were litigating over the compromise strip. Suit was brought against the Montana company to recover damages for such extraction, and an injunction was applied for to prevent the Montana company from mining underneath the *compromise strip,* upon the allegation that that company had mined out all of the vein east of the compromise strip, and were insolvent, possessed no other assets, and unless it was enjoined, the St. Louis company would not be able to satisfy its judgment when obtained, a proceeding which seems to be sanctioned by the Montana Code of Civil Procedure.[19] The circuit court of appeals sustained the injunction on the theory that the St. Louis company would probably recover judgment, the supreme court of the United States having intimated that by awarding the ore underneath the compromise strip to the Montana company, the right of the St. Louis company to the ore underneath the Nine Hour surface beyond that strip was not affected.[20]

Subsequently the St. Louis company recovered judgment for the trespass, which judgment was affirmed.[21]

The supreme court of California applied the rule announced by the supreme court of the United States in the St. Louis-Montana case in Riley v. North Star

[19] § 6643.

[20] Montana M. & M. Co. v. St. Louis M. & M. Co., 168 Fed. 514, 93 C. C. A. 536.

[21] Montana M. Co. v. St. Louis M. & M. Co., 183 Fed. 51, 105 C. C. A. 343.

M. Co.,[22] the facts of which were somewhat similar, i. e., an agreement to reconvey part of a mining claim after patent should be obtained, to avoid the necessity for filing an adverse claim. The agreement and deed in the Riley case contained the usual *habendum* clause, inserting in a blank space on a printed form the words "mining right." The court held that this conveyed the part of the Massachusetts Hill vein underlying the area described in the deed, the apex of the vein being admittedly entirely outside of the property deeded. Chief Justice Beatty dissented.

In the case of Bogart v. Amanda Consolidated G. M. Co.,[23] an agreement to convey was made containing substantially the following covenant:—

> The first parties agree within ten days after the issuance of the patent for the said Bogart lode to convey to said second parties . . . . the surface ground included within the conflict . . . . saving, excluding and excepting from said deed so to be made the Bogart vein or lode, ledge, or deposit wherever the same may be found to cross through the conflicting surface.

In an application for a decree of specific performance it was claimed by the grantor that the grantee was entitled to a deed conveying only the surface. The court held that the grantee was entitled to a conveyance not merely of the surface ground, but of the underlying minerals, except the Bogart vein, the reservation in terms of the Bogart vein being an indication that the parties intended that everything else should pass.

The question of the effect of a conveyance of a part of the claim containing the apex of the vein and the

22 152 Cal. 549, 93 Pac. 194, 197.

23 32 Colo. 32, 74 Pac. 882, 883.

construction of such conveyance as defining the extralateral rights of grantor and grantee was given full consideration by the supreme court of Montana in the case of Montana Ore Purchasing Co. v. Boston and Montana Cons. C. & S. Co.,[24] the facts of which may be best explained by the use of diagrams.

Figure 123 represents the Johnstown lode claim as patented, containing a series of veins substantially as there shown. We are using the diagram as the basis of illustration which accompanied the opinion of the court on rehearing, to which we shall later refer. There is a slight difference in lettering between the two diagrams.

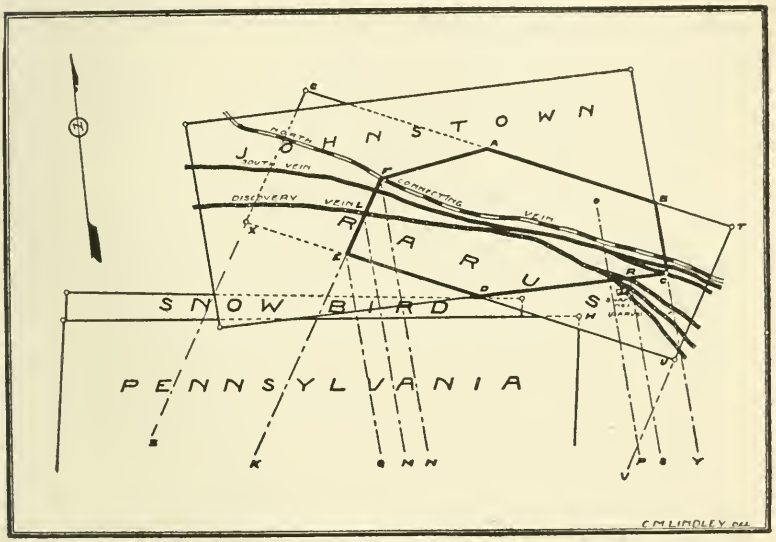


FIGURE 123.

By the application of the rules discussed in the preceding articles, there is no difficulty in ascertaining the extent of the extralateral right in each of the veins flowing from the patent. There can be no question

[24] 27 Mont. 288, 70 Pac. 1114.

but that the patentee could grant any part of the claim or of its extralateral right on any of the veins. Parties contracting with reference to this class of property may fix such boundaries as they choose, and if they do so explicitly, the courts are relieved from embarrassment. It is only where they fail to expressly define the extent of the grant that the courts are compelled to ascertain what the parties intended to convey by reference to the surrounding circumstances and the nature and character of the property which is the subject of the transaction.

In the case under consideration, the parties failed to make such explicit definition of the extent of the grant. After the issuance of the patent to the Johnstown, the patentee executed a deed conveying the surface A-B-C-D-E-F, which surface may be called the "conveyed portion," indicated by the heavier black lines. This subsequently passed by mesne conveyances to the Montana Ore Purchasing Company under a deed which described it by metes and bounds, omitting all reference to metals, ores, quartz-bearing rock, etc., frequently found in such conveyances.

This company also owned the Rarus, a senior location coincident with the conveyed portion of the Johnstown, to the extent shown on figure 123. The patent, however, having been issued to the Johnstown, the junior claim covering the area in conflict apparently without protest, the Rarus as a separate claim lost its identity so far as the conflict was concerned. The questions at issue, therefore, were considered without regard to any right under the Rarus title. The Boston and Montana company owned the unconveyed portion of the Johnstown, also a part of the Pennsylvania lying to the south of the Johnstown. The controversy involved the ownership of the ore bodies underneath this

portion of the Pennsylvania, the Montana Ore Purchasing Company claiming apex rights originating within the conveyed portion of the Johnstown. The case involved the position and course of the Pennsylvania veins, the identity of the veins, an alleged union in depth, and the usual complications of a structural character. The findings of fact as to these issues supported the contention of the Montana Ore Purchasing Company. The remaining question was as to the extralateral right pertaining to that company by virtue of its ownership of the conveyed portion of the Johnstown. It was contended by that company that its extralateral right should be defined by the two planes, —one through that part of the east end-line of the Johnstown claim, extending from B to C extended in the direction of Y,—the other through the west end-line of the part conveyed, F-E extended in the direction of K. The trial court fixed the limit toward the east by passing planes through the points where the veins depart from the conveyed portion—e. g., R-S and O-P, parallel to the east end-line of the Johnstown. Toward the west the limit was fixed by a plane passing in the direction of the line F-K until it meets the plane of the west end-line of the Johnstown produced, and thence in the direction of that line extended. These planes had been previously adopted by Judge De Haven, sitting as circuit judge, on an injunction application in previous litigation between the same parties.[25]

The supreme court of Montana, however, directed a modification of the decree of the trial court, declining to accept Judge De Haven's views. It directed that the decree should be modified so as to fix the west end-

[25] Boston & Montana C. & S. M. Co. v. Montana O. P. Co., 89 Fed. 529, 19 Morr. Min. Rep. 480.

planes in the direction of the line L-M parallel to the west end-line of the Johnstown at the points where the different veins pass through the line F-E, the west boundary of the conveyed premises, leaving the east end-line planes fixed by the trial court undisturbed.[26]

In the course of its opinion the court, dealing with this class of conveyances, expressed its views as follows:—

> In determining the effect of these conveyances, regard must be had not only to the terms employed in them and the surrounding circumstances, but also to the character of the property granted. An ordinary conveyance of agricultural land or of town lots describes the subject of the grant merely by metes and bounds, as so much of the earth's surface. Yet, without specific mention, the grant includes the right of support from lands adjacent thereto, as well as everything above and beneath the surface, unless, by apposite words contained in it, some reservation is made. These rights, conveyed without specific description, are not mere incidents, but are substantive parts of that which is described to the extent that without them the subject of the grant is not susceptible of its appropriate use and enjoyment; in other words, the rights conveyed extend far beyond the specific words of description contained in the deed. Now, a patent from the United States to a quartz claim conveys everything which is granted by an ordinary conveyance between private parties, and in many cases much more. If the conditions of the

[26] In the case of Butte & Boston M. Co. v. Société Anonyme des Mines de Lexington, 23 Mont. 177, 75 Am. St. Rep. 505, 58 Pac. 111, the supreme court of Montana had before it an instruction of the court which followed Judge De Haven's opinion, above noted, defining the extralateral right boundary by a vertical plane drawn through the conveyed boundary, regardless of the course of the original end-line planes. This question, however, was not urged before the supreme court, and its opinion does not refer to it in any way other than by a mere recital of the instruction.

law have been observed, it conveys, in addition to what is found beneath the surface described therein, all the veins, to their utmost depths, the tops, or apices, of which are found within the surface granted, though they so far depart from the perpendicular in their descent into the earth as to extend outside of the vertical side-lines of such surface. As, in a conveyance of agricultural lands or town lots, everything is presumed to be granted which is necessary to the enjoyment of the species of property, without specific description, so by a deed to a quartz claim, or a definite portion thereof, as such, everything necessary to the proper and full enjoyment of that species of property will be presumed to have been conveyed, unless there be employed specific words showing the intention of the grantor to make some reservation. Extralateral rights are not a mere incident or appurtenance, but a substantial part of the property itself which is the subject of the grant. They are not susceptible of a more definite description than that contained in the statute, which the patent follows, because the conditions beneath the surface cannot be ascertained prior to the issuance of patent; but we apprehend that they would pass from the government to the grantee under a patent to a quartz claim, as such, by virtue of the provisions of the statute, even though the patent contained no express reference to them whatever.[27]

Subsequently, on rehearing,[28] the court modified its original opinion by fixing the western limit of the extralateral right of the Montana Ore Purchasing Company on all the veins by the plane E-Q—a plane parallel to the west end-line of the Johnstown claim applied at the southwest corner of the conveyed tract. This in-

[27] Montana O. P. Co. v. Boston & Montana Cons. C. & S. M. Co., 27 Mont. 288, 70 Pac. 1114, 1124.

[28] 27 Mont. 536, 71 Pac. 1005.

terpretation gives to the ore purchasing company full intralimital rights within the conveyed tract and an extralateral right commencing at E, where a conventional apex is established for extralateral purposes. Everything west of that plane and east of west endline plane of the Johnstown remained the property of the Boston and Montana.

The case of Stinchfield v. Gillis,[29] cited by Judge De Haven in his opinion above referred to, and commented on by the supreme court of Montana in the case between the Montana Ore Purchasing Company and Boston and Montana Company, is worthy of a short analysis, as involving some of the elements under discussion.

The facts may be illustrated by figure 124, a longitudinal section, the vertical bounding plane between the Carrington and the Pine Tree being represented by the dotted line B. The other details shown on the figure are self-explanatory. The facts, so far as they presently concern us, were briefly as follows:

One Carrington was originally in possession of a certain mining claim, consisting of a tract of land about seven hundred and fifty feet in length by about four hundred and fifty feet in width. After leaving the section of the country where this property was situated, he transferred the same to defendant Gillis. However, no valid location as required by the laws of the United States had ever been made.

On January 17, 1886, Gillis, by bargain and sale deed, conveyed to plaintiff Stinchfield a portion of this claim, being a strip of land one hundred and seventy-one feet in width on the eastern side thereof.

The strip thus conveyed became known as the Pine Tree mine, and contained two veins, the Pine Tree vein

[29] 96 Cal. 33, 30 Pac. 839, 17 Morr. Min. Rep. 497; 107 Cal. 84, 40 Pac. 98.

(which may be omitted from consideration here), dipping to the east, and the West vein, dipping to the west. On the remainder of the Carrington claim there were three systems of veins, all dipping to the east, known respectively as the Carrington vein, the Criss vein, and the Rice vein. The Rice vein was composed of three small veins running parallel and in close proximity. Neither the Carrington nor Criss veins are shown on the diagram, as they are not necessary to a proper

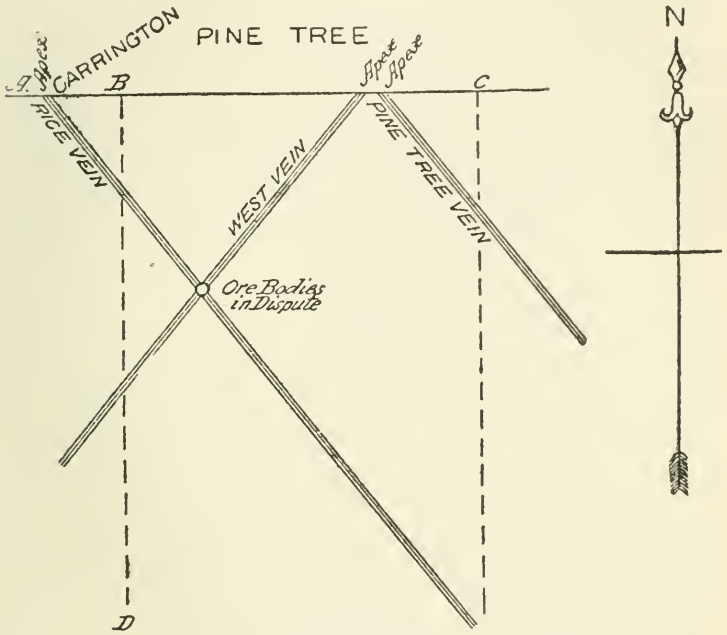


FIGURE 124.

understanding of the case. The controversy arose over the ore bodies found at the intersection of the West vein with the Rice vein.

The veins in both claims run on a northwesterly and southeasterly direction, with the exception of the West vein, which runs north and south, and all dip to the

east, with the exception of the West, which dips to the west, and crosses the veins from the Carrington claim at nearly right angles. The only place where gold occurs is at these crossings.

On the day following the conveyance of the Pine Tree mine Gillis located according to law the remainder of the Carrington claim. Two days after Gillis had made this location plaintiff Stinchfield also relocated the Pine Tree mine.

Subsequently, while following the Rice vein on its dip under the Pine Tree ground, the tenants of the defendant Gillis encountered the West vein at its intersection with the Rice vein at the point marked on figure 124 "Ore bodies in dispute." They continued work and extracted all the gold to be found within the space of such intersection. Later, plaintiff Stinchfield, while working on the West vein, broke into defendant's works at the point of intersection and found that defendant had already extracted all the gold in that space. He then brought this action for the value of the gold alleged to have been removed from the said space of intersection.

Gillis' main reliance to defeat Stinchfield's claim was based upon his assertion that the Carrington was a prior location, and that he had a right to the ore within the space of intersection of the two veins, under section twenty-three hundred and thirty-six of the Revised Statutes. The court held that the apex being within the Pine Tree and the ore bodies in dispute being underneath the surface of that claim, Stinchfield was entitled to them under his conveyance; that by such conveyance Gillis was estopped from asserting that the original claim was not properly located, and from setting up any title by virtue of the subsequent location of the Carrington which would impair the legal

effect of the prior conveyance of the Pine Tree; that as against the conveyance of the tract including the apex of the Pine Tree vein, Gillis could not claim the benefit of the section of the Revised Statutes relating to veins uniting in depth. The supreme court of California did not feel called upon to determine whether Stinchfield would have been entitled to follow the West vein into the ground retained by Gillis or whether Gillis would have been entitled to follow the Pine Tree vein beyond the intersection underneath the Pine Tree, such question not being involved in the appeal. But in the course of its opinion it said:—

> We concede that when mining ground is conveyed by deed, without express limitation, the grantee takes subject to the characteristics of mining property given to it by prevailing customs and laws and not with the absolute dominion which flows from a conveyance in fee of ordinary land.[30]

This principle is undoubtedly recognized in all the cases heretofore reviewed. Its application to individual cases must, of course, depend largely upon the language of the conveyance in question, the situation of the parties, the surrounding circumstances, and the nature and character of the property.

§ 618a. **Effect on extralateral right where the owner of the location conveys the adjoining ground into which the vein penetrates on its downward course.**— We may assume, for the purpose of discussing the effect on the extralateral right where the owner of the location conveys the adjoining ground into which the vein penetrates on its downward course, the facts disclosed in the case of the Central Eureka Min. Co. v. East Central Eureka Min. Co., which are illustrated

[30] 107 Cal. 84, 90, 40 Pac. 98, 99.

on figure 53 (page 1272 of this treatise). The title of the Central Eureka to the Summit quartz mine is evidenced by a lode patent issued under the act of 1872. The vein on its downward course passes underneath the Toman ranch, patented under the homestead laws, the title being junior in point of time to the title of the Summit mine. The Central Eureka, being the owner of the Summit, at one time entered into a contract to purchase the Toman ranch, but subsequently abandoned it, and to clear the records executed a quitclaim deed to the Tomans of all that part of the Toman ranch lying east of the patented mining ground known as the Summit mine. The deed was in the ordinary form and contained no reservations. It was contended on the part of the agricultural owners that the deed was to be given its common-law effect, and construed so as to convey all that part of the Summit vein which on its downward course is found underneath the agricultural surface. The trial court, Judge R. C. Rust, superior judge of Amador county, California, presiding, held that the part of the Summit vein in controversy belonged exclusively to the Summit quartz mine, and did not pass by a conveyance of the Toman ranch.

In this ruling the trial court was sustained by the supreme court of California[31] and by the supreme court of the United States.[32]

The contention of the Central Eureka, which was sustained by the courts, may be briefly outlined: The description in the conveyance was of that portion of the Toman ranch "lying east of that certain patented

31 Central Eureka Min. Co. v. East Central Eureka Min. Co., 146 Cal. 147, 79 Pac. 834, 9 L. R. A., N. S., 940.

32 East Central Eureka Min. Co. v. Central Eureka Min. Co., 204 U. S. 266, 27 Sup. Ct. Rep. 258, 51 L. ed. 476.

mining ground known as the Summit quartz mine." This necessarily excludes the Summit quartz mine and everything pertaining to the "patented mining ground." The grant to the Summit patentee was of the vein having its top, or apex, within the claim throughout its entire depth between the end-line planes. The grant of the extralateral right follows from the statute, whether effect be given to the express grant of that right in the patent or not,[33] and would follow in the absence of any specific grant of such right embodied in the patent.[34]

The underground segment of the vein within the Summit end-line planes lying underneath the surface of the Toman ranch would pass by a conveyance of the Summit quartz mine by name or by description by metes and bounds. This principle finds ample authority in the cases cited in the preceding section. As a corollary to this principle, no part of the extralateral right on a vein acquired through a federal mining location or patent would be conveyed by a deed simply describing land adjoining into which the vein penetrated.[35]

As appears from the adjudicated cases, this is true where the contiguous land conveyed is the subject of patent under the mining law; *a fortiori,* should it be true when land patented under the agricultural laws is conveyed. To illustrate: Among the numerous controversies arising out of conflicting locations in the Coeur

[33] Doe v. Waterloo M. Co., 54 Fed. 935, 941.

[34] Montana O. P. Co. v. Boston & Montana Cons. C. & S. M. Co., 27 Mont. 288, 70 Pac. 1114, 1124; S. C., on rehearing, 27 Mont. 536, 71 Pac. 1005.

[35] This principle is restated and the doctrine approved, but case differentiated. Riley v. North Star Min. Co., 152 Cal. 549, 93 Pac. 194, 197.

d'Alenes, Idaho, was one involving the respective rights of four mining claims, the relative situation of which is shown on figure 125.

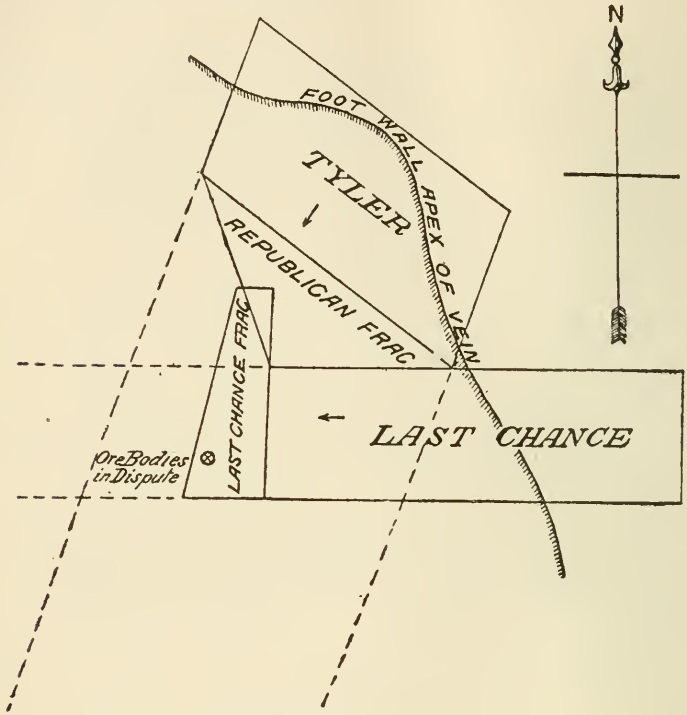


FIGURE 125.

Priorities had been adjudicated as follows: The Last Chance was first, the Tyler second. The Last Chance Fraction and Republican Fraction were junior to the first two. The lode passed through the two side-lines of the Last Chance, making these lines the true end-lines of the claim. On its downward course, between the extralateral-right planes of the Tyler and Last Chance, the vein passed underneath the surface of the Last Chance Fraction and Republican Fraction, held

in different ownership from either the Tyler or Last Chance.

The extralateral right of the Tyler was adjudicated to be southward within its end-line planes, but by reason of the priority of the Last Chance over the Tyler, the Tyler company lost so much of the vein underground as was found within the Last Chance end-lines, and these lines produced westwardly. At one stage of the litigation the Last Chance company filed a pleading by which it disclaimed all right, title, or interest in or to the Last Chance Fraction and the Republican Fraction. Subsequently the Tyler company, asserting its right to the vein within its end-line planes underneath the surface of the Republican and Last Chance Fractions, and within the Last Chance extralateral-right planes, contended that by this disclaimer the Last Chance company was estopped from claiming any part of the vein underneath the two fractional claims, notwithstanding its priority and apex ownership in the Last Chance claim. Touching this contention, the circuit court of appeals said:—

> The suggestion of counsel for the appellant that the Last Chance company, by its pleadings, disclaimed all interest in the vein in question underneath the surface of the Republican and Last Chance Fraction claims is not supported by the record. The Last Chance company did disclaim any interest in either of these claims, but, inasmuch as the vein in question has its apex within the surface lines of the Last Chance location, and on its dip under the true side-lines of the Last Chance location passes under the surface of the Republican and Last Chance Fraction claims, it is in its descent as much a part of the Last Chance location as if entirely within its surface lines. It constitutes no part of the Republican or Last Chance Fraction claims, and therefore, in disclaiming any interest in these claims, the Last

Chance company did not thereby disclaim any interest in the vein.[36]

Suppose the Last Chance company in the case above cited had owned the three claims,—the Last Chance, the Last Chance Fraction, and the Republican Fraction,—and had conveyed the two last named, without reserving in terms the extralateral right pertaining to the original Last Chance, could it be contended that it lost the Last Chance extralateral right which accrued to it by virtue of the ownership of the apex within the Last Chance surface? We think not.

It is our view that the application of the principles upheld by the courts in the cases noted in the preceding sections (notably Montana M. Co. v. St. Louis M. and M. Co.[37] and Montana Ore Purchasing Co. v. Boston and Montana Cons. C. & S. M. Co.[38]) would result in the determination that in cases like the Central Eureka-Toman case, the conveyance of the adjoining land overlying the downward course of the vein, would not carry the underlying vein, unless the language of the deed expressly provided that it should.

§ 618b. Effect of conveyance of segregated parts of unpatented claims.—Mining claims properly located frequently become the subject of division or segregation and sale. Under miners' rules and customs, and under the act of 1866, when the lode was the principal thing located and the surface ground a mere incident, it was a matter of common occurrence for locators by conveyance to segregate among themselves, by measurements along the vein, the number of feet to which each

[36] Tyler M. Co. v. Last Chance M. Co., 90 Fed. 15, 21, 32 C. C. A. 498.

[37] 102 Fed. 430, 42 C. C. A. 415, 20 Morr. Min. Rep. 507.

[38] 27 Mont. 288, 70 Pac. 1114.

was entitled, thus severing the unity of title and creating an individual estate in each segregated portion. If patents were applied for, each made application for his segregated portion of the same as if it had been an original location. The change in the method of location inaugurated by the act of 1872, the distinguishing feature of which was the location of a surface containing or supposed to contain a lode, made it difficult to convey segregated parts and preserve the integrity of each part.

In the case of Little Pittsburg Cons. Min. Co. v. Amie,[39] Judge Hallett ruled that a locator might sell or otherwise dispose of that portion of his location which covers his discovery and workings without affecting the right to the remainder. This might be true under some circumstances. If the unconveyed portion contained a part of the apex of the vein so that it might become the subject of a separate application for patent, the right to the unconveyed portion might be defended on the theory of two separate locations of diminished area, each possessing all the attributes of a separate and distinct location. Certainly with a severance of unity of title one patent could not issue for both parts. Each part would have to respond to the requirements of the law as to discovery, patent work and other essentials. Where, however, the unconveyed part contains neither discovery nor workings, patent could not issue for such part.[40] Loss of discovery results in loss of location. New discovery in the unsurveyed part will alone save it from reverting to the public domain. Where there has been a severance of a mining claim, entry may be allowed and patent

[39] 17 Fed. 57, 58, 5 McCrary, 298, cited in Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co., 125 Fed. 408, 414.

[40] *Ante*, § 338.

issued on the part of the claim within which discovery was made and as to which all the requirements of the mining laws have been met, without regard to the remainder of the claim.[41] Possible exceptions to this rule may be noted where a lode claim as located is intersected by a prior claim. In many such instances the right to the net area of the claim, deducting the conflict area, is sustained. We are now speaking, however, of voluntary conveyances of a location by the locator or his successors in estate. If we can assume a case of a partition of a lode claim into two distinct tracts with different ownership, annual work on one tract would not inure to the benefit of the other, in the absence of an agreement to such effect, because the unity of title has been destroyed.

In Zeckendorf v. Hutchinson,[42] six persons located a lode claim, and after location, the interests of the locators were segregated, so that each had assigned to him a specific part of the area covered by the location. At the time of location, the law of New Mexico required the sinking of a discovery shaft. One such shaft was sunk, whether before or after the segregation does not clearly appear, although the inference is that the segregation preceded the sinking of the shaft.

In an action brought by the vendees of the owner of one of the segregated tracts to obtain an injunction against a third party from removing ore from the tract, the court held that the bill of complaint was fatally defective in not averring the sinking of a discovery shaft on the segregated tract involved. This ruling, it would seem, was tantamount to a determination that the segregation resulted in such a severance

41 Pittsburg Nevada Min. Co., 39 L. D. 523.

42 1 N. M. 476, 9 Morr. Min. Rep. 483.

of title that the sinking of the discovery shaft on one of the tracts did not inure to the benefit of the others, and that a separate shaft was essential for each segregated tract. In other words, by this severance of title each tract became in effect a separate and distinct claim requiring the sinking of a separate shaft on each one.

In the early history of mining camps the surface ground of lode claims is disposed of for residence or business purposes, usually under executory contracts, the mineral rights being reserved. This does not destroy the unity of title so as to affect the patenting of the entire area of the claim. In such cases the patent when issued will inure to the benefit of the purchaser of the surface, the estate of the patentee being diminished to that extent.

Some interesting questions have arisen in the oil regions of Central California, where locations of oil placers were made without discovery, the located area being subsequently subdivided and sold and discovery thereafter made.

In Miller v. Chrisman,[43] eight persons located one hundred and sixty acres of oil placer ground, and prior to discovery they conveyed to Miller. Shortly thereafter he executed what purported to be an abandonment of his rights under this location and on the same day made a location on behalf of himself and seven associates. Thereafter, and prior to discovery, Miller's associates and colocators conveyed their interests to him. Subsequently Miller made discovery. It was held that this discovery validated and perfected the entire one hundred and sixty acre location, as against others who, in the meanwhile, had attempted to locate without discovery. The transfer by his associates to

[43] 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444.

Miller was held to be a conveyance of a right of property flowing from a valid possession, and vested in Miller the right to perfect a location. When perfected, he became the owner of the entire location. There was no destruction of the unity of the title.

In Weed v. Snook,[44] an association of persons located eighty acres of placer lands and prior to discovery conveyed ten acres to the Lion Oil Company, which company in due time made a discovery. This discovery, though made after conveyance and segregation of title, completed and validated the eighty acre location. In other words, the discovery by the grantee on the ten acre tract inured to the benefit of the grantor, who retained the other seventy acres. The opinion in the case does not suggest the existence of any agreement or understanding between the two parties to the conveyance whereby a discovery, when made by the grantee, should inure to the benefit of the unconveyed part of the tract retained by the grantor, although in the subsequent case next discussed the court said that its opinion in the Weed-Snook case was to be understood "in this sense."

In Merced Oil Min. Co. v. Patterson[45] eight associates located an oil placer of one hundred and sixty acres. Before any discovery of oil was made the associates conveyed in severalty forty acres to the Merced Oil Company and a like number of acres to one Castle. The Merced Oil Company subsequently discovered oil, but Castle made no discovery. Castle and the oil company joined in an action against third parties to enjoin trespass, the third parties claiming title under later locations.

[44] 144 Cal. 439, 77 Pac. 1023.

[45] 153 Cal. 624, 96 Pac. 90.

Two questions were submitted to the supreme court for its consideration:—

(A) Did the discovery of the Merced Oil Company on its tract inure to the benefit of Castle's forty, thus relieving him from making a separate discovery?

(B) Did the annual labor of one hundred dollars done upon any one of the segregated tracts inure to the benefit of the other tracts, relieving the respective owners from the necessity of performing labor to the statutory amount?

The court, in deciding both questions in the negative, held that the conveyance, being absolute on its face, was in effect an abandonment, and had the effect practically of creating as many separate locations as there were conveyances.

It was conceded by the court that an agreement might be made between grantor and grantee by which discovery made or work done on any one tract should inure to the benefit of the others. But, in the absence of such agreement, either expressed in the instrument of conveyance or proved by parol, there was no such community of interest which would enable the owner of one segregated tract to claim the benefit of what was done on another.

On subsequent appeal in the same case after retrial it appeared fortuitously that such a contract existed, and the principle was reaffirmed.[46]

Segregations of this character are rare, as the unity of title and possession is usually preserved until after patent has been issued. Transfers of fractions of claims are frequently made in cases of conflicting areas, where the conveyed tract is either covered by a new location or is recognized as lapsing by virtue of

[46] Merced Oil Co. v. Patterson, 162 Cal. 358, 122 Pac. 950, 952.

a conceded priority into the boundaries of another previously existing location. In cases of this character, the questions here discussed do not arise.

The application of the doctrine of Merced Oil Co. v. Patterson, recognizing the right of grantor and grantee to deal with this question of discovery by agreement after segregation of title, will meet with some difficulty, if patents are to be applied for, and no discovery is shown except in land which at the time of the patent application does not belong to the patent applicant, unless the locations fall within the curative statute hereafter referred to. It is difficult to overcome legal requirements by contracts between individuals.

The land department steadfastly declined to follow the rule announced in the California cases, holding that a subsequent discovery by a grantee only entitled him to hold the unit of an individual placer location—i. e., twenty acres.[47]

Congress thereupon intervened, and on March 2, 1911, passed an act entitled "An act to protect the locators in good faith of oil and gas land who shall have effected an actual discovery of oil or gas on the public lands of the United States, or other successors in interest,"[48] which is as follows:—

> That in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil or gas solely because of any transfer or assignment thereof or of any interests therein by the original locator or locators, or any of them, to any qualified persons or person or corporation prior to discovery of oil or gas therein, but if such claim is in all other respects valid and regular, patent

[47] In re Yard, 38 L. D. 59; Bakersfield Fuel & Oil Co., 39 L. D. 460.

[48] 36 Stats. at Large, 1015; Comp. Stats. (Supp. 1911), p. 612; 1 Fed. Stats. Ann. (Supp. 1912), p. 271.

therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof, as in other cases. *Provided, however,* that such lands were not at the time of the inception of the development on or under such claim withdrawn from mineral entry.

It will be noted that this is purely a curative statute, not operating prospectively,[49] and is limited to oil and gas locations made prior to the passage of the act on lands not withdrawn from mineral entry.[50]

[49] See p. 66, Circ. No. 187, U. S. Min. Laws & Reg., ed. Nov. 6, 1912.

[50] As to the withdrawals of this class of lands by executive order, see discussion, *ante,* §§ 200a, 200b, 200c.

CHAPTER IV.

THE NATURE AND EXTENT OF PROPERTY RIGHTS CONFERRED BY PLACER LOCATIONS.

§ 619. Rights conferred by placer locations as compared with lode locations.

§ 619. Rights conferred by placer locations as compared with lode locations.—The rights conferred by a valid placer location differ in degree from those inuring to a lode locator, owing to the difference in the nature of the thing appropriated.

> That a vein or lode, descending, as it often does, to great depths, may contain more mineral than can be obtained from the loose deposits which are secured by placer mining within the same limits of surface area, naturally gives to the surface area a higher value in the one case than the other, and that congress appreciated this difference is shown by the different prices charged for the surface under the two conditions. . . . .
>
> A placer location is not a location of veins or lodes underneath the surface, but is simply a claim of a tract or parcel of ground for the sake of loose deposits of mineral upon or near the surface.[1]

While the estate is of the same dignity and is held by the same tenure, there are no extralimital privileges accruing to a placer locator, and the intralimital rights may, under certain conditions, be abridged. Veins having their apices within the limits of a placer claim, whose existence is known prior to the filing of an application for placer patent, do not vest in the placer claimant by virtue of his placer location. Should he

[1] Clipper Min. Co. v. Eli Min. & Land Co., 194 U. S. 220, 228, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

fail to discover and claim such veins, they may whenever such discovery is made thereon be located by others (provided entry on the placer can be made peaceably),[2] thus subjecting the placer claim to diminution to the extent of a surface width of twenty-five feet on each side of the center of the vein.[3] The subject of locating lodes within placers has been fully presented in preceding articles,[4] and repetition is unnecessary. With the exception of the right to locate known veins, which may be exercised by strangers entering peaceably, the placer claimant has the same dominion over the located surface as a lode locator has over the surface of his lode claim; and as in case of lode claims, the placer boundaries underneath the surface may be invaded by the proprietor of a vein, or lode, having its apex outside of the placer boundaries, in the exercise of the extralateral right.[5]

It is unnecessary to assert that neither a placer location nor a placer patent, as such, will confer extralateral rights as to any lodes, the tops, or apices of which are found within the limits of a placer claim.[6] In order to confer such rights, the lode must be located the same as if it were situated elsewhere upon the public domain. In such case, the extralateral right as to the lode is defined by the lode boundaries, which may or may not be coincident with some of the placer boundaries. Should veins or lodes having their apices within the limits of a placer claim be discovered after

[2] Clipper Min. Co. v. Eli Min. & Land Co., 194 U. S. 220, 230, 231, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

[3] Id., p. 231.

[4] *Ante*, §§ 413, 415.

[5] *Ante*, § 611. This view is sustained inferentially in Clipper Min. Co. v. Eli Min. & Land Co., 194 U. S. 220, 228, 230, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

[6] Id., and see Woods v. Holden, 26 L. D. 198, 205.

patent, the placer claimant will hold only so much of them as may be included within vertical planes drawn through his surface boundaries.

The rights flowing from a perfected placer location prior to application for patent confer on the locator the exclusive possession of the surface, but do not operate to give title or right of possession to known veins or lodes within its limits, and do not preclude others from discovering and locating unknown veins or lodes, provided entry for such purpose can be made peaceably.[7]

[7] Clipper Min. Co. v. Eli Min. & Land Co., 194 U. S. 220, 229–231, 24 Sup. Ct. Rep. 632, 48 L. ed. 944; and see Aurora Lode v. Bulger Hill Placer, 23 L. D. 95.

CHAPTER V.

PERPETUATION OF THE ESTATE BY ANNUAL DEVELOPMENT AND IMPROVEMENT.

§ 623. Annual labor under local rules—Provisions of the federal law.
§ 624. Requirements as to annual labor imperative in order to protect claim from relocation.
§ 625. Annual labor upon placer claims.
§ 626. Supplemental state legislation.
§ 627. Division of the subject.
§ 628. "Claim" defined.
§ 629. Work done within the limits of a single location.
§ 630. Work done within the limits of a group of claims in furtherance of a common system of development.
§ 631. Work done outside of the boundaries of a claim or group of claims.
§ 631a. Work upon placer claims containing lodes located by placer claimant.
§ 632. Period within which work must be done—Can preliminary work required by state laws as an act of location be credited on the first year's work?
§ 633. By whom labor must be performed.
§ 634. Circumstances under which performance of annual labor is excused.
§ 635. Value of labor and improvements — How estimated.
§ 636. Proof of annual labor under state laws.
§ 637. Obligation to perform labor annually ceases with the final entry at the land office.
§ 638. Millsites.

§ 623. Annual labor under local rules—Provisions of the federal law.—From the earliest period of mining in the west, the locator of mining claims of all classes was required to perform a certain amount of labor, or expend a certain amount of money in betterments and improvements upon, or for the benefit of, his located claim, as a condition upon which he might continue in the possession and enjoyment of the mining ground appropriated by him to the exclusion of others. A failure to perform the necessary work required by the local rules or customs amounted to an abandonment of

the claim, and thereupon it might be occupied and appropriated by another.[1]

The regulations of miners which required that so much work should be performed upon each claim were conditions subsequent, subject to which the locator acquired his rights. So long as he complied with these conditions, the right to possess and mine his claim remained with him.[2]

The nature and extent of the work required to be performed varied according to the character of the ground appropriated. The periods within which the expenditure was required to be made also varied. Certain classes of claims, such as placers, on the beds, bars, and banks of streams, could only be worked at certain seasons of the year, while quartz claims might be exploited at any time. Different rules obtained in different localities, but in all there were regulations and customs well understood and generally observed, compliance with which was insisted upon to protect the claim from being "jumped" or appropriated by another.

As noted in a previous section,[3] discovery was made the source of title, and development, or working, the condition of its preservation. This development work was called by the miners "assessment work," and the performance of it a *representation* of the mine; that is, when the work had been performed for a given period, the claim was *represented* for that period. Both of these terms are frequently encountered in the

1 Depuy v. Williams, 26 Cal. 310, 314, 5 Morr. Min. Rep. 251; Kramer v. Settle, 1 Idaho, 485, 9 Morr. Min. Rep. 561; Cons. Repub. M. Co. v. Lebanon M. Co., 9 Colo. 343, 12 Pac. 212, 15 Morr. Min. Rep. 490; Jennison v. Kirk, 98 U. S. 453, 457, 25 L. ed. 240, 4 Morr. Min. Rep. 504; St. John v. Kidd, 26 Cal. 263, 4 Morr. Min. Rep. 454.

2 King v. Edwards, 1 Mont. 235, 240, 4 Morr. Min. Rep. 480.

3 § 335.

decisions of the courts, and they each have a recognized meaning.

The congressional law of July 26, 1866, made no attempt to legislate on the subject of working mining claims, leaving it entirely to local district or state regulation.

The act of May 10, 1872, however, made provision for the performance of work annually on all claims theretofore or thereafter located.

As originally passed, this act required that, on all claims located prior to its passage, ten dollars' worth of labor should be performed, or improvements made each year, for each one hundred feet in length along the vein, until a patent issued. On each claim located after the act went into effect, and until patent should issue, not less than one hundred dollars' worth of work was required to be performed, or improvements made, during each year.

By the phrase "each year," as applied to pre-existing locations, was meant each year from and after the passage of the act. Work done before the act went into effect could not be estimated.[4]

By the several amendments subsequently passed,[5] the time for making the first annual expenditure on previously located claims was extended to January 1, 1875.

As to claims located since the act of May 10, 1872, the year within which work was required to be performed was computed from the date of the respective locations, until, by an act passed January 22, 1880,[6] congress provided that the period within which the

[4] Thompson v. Jacobs, 3 Utah, 246, 2 Pac. 714, 716.

[5] March 3, 1873, 17 Stats. at Large, p. 483; June 6, 1874, 18 Stats. at Large, p. 61.

[6] 21 Stats. at Large, p. 61; Comp. Stats. 1901, p. 1426.

work to be done annually on all unpatented claims located since May 10, 1872, should commence on the first day of January next succeeding the date of location of such claim.

The object of the act of 1880 was to render the annual periods for performing work uniform as to all mining claims, by reference to the calender year.[7] It did not act retrospectively, so as to save a claim from forfeiture incurred before its passage,[8] nor to divest a right already acquired under the existing law;[9] but the exemption of claims from the performance of labor for a portion of a year, in certain cases, was a necessary result of the act.[10]

This act of January 22, 1880, is now in force, and in connection with such valid supplemental state legislation, if any, as exists in the several local jurisdictions, is operative as to all locations made since the passage of the act of May 10, 1872.[11] It is not likely that there are now many claims located prior to that date which still remain unpatented. There is no necessity for giving this class of locations any further consideration. We shall discuss the law as it applies to present conditions. On March 2, 1907, congress passed an act[12] which refers to annual labor in Alaska, and provides "that during each year and until patent has been

7 McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652, 658, 15 Morr. Min. Rep. 329.

8 Slavonian M. Co. v. Vacavich, 7 Saw. 217, 7 Fed. 331, 1 Morr. Min. Rep. 541.

9 Hall v. Hale, 8 Colo. 351, 8 Pac. 580, 581.

10 McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652, 658, 15 Morr. Min. Rep. 329, citing Wade's Am. Min. Law, § 29, p. 54; Sickle's Min. Laws, p. 393. See, also, Hall v. Hale, 8 Colo. 351, 8 Pac. 580, 581.

11 McKay v. McDougall, 25 Mont. 258, 87 Am. St. Rep. 395, 64 Pac. 669, 671.

12 34 Stats. at Large, 1243, sec. 1; Comp. Stats. (Supp. 1911), p. 609; Fed. Stats. Ann. (Supp. 1909), p. 25.

issued,'' one hundred dollars' worth of labor shall be performed for each claim ''in accordance with existing law.'' While the first proviso, interpreted literally, would require work to be performed during the first calendar year in which the location is made, it would seem from the second proviso above quoted that there was no intention to alter the existing law in this respect. A different rule, however, pertains to placers in Alaska, where annual labor is specifically required to be done, including the year in which the location is made.[13]

§ 624. Requirement as to annual labor imperative in order to protect the claim from relocation.—The question as to performance or nonperformance of the annual labor is not one in which the government is directly concerned.[14] It only arises in the presence of one claiming under a relocation asserting the noncompliance by the former owner of the claim with the requirements of the law. In other words, it is not necessary to perform the annual labor except to protect the rights of the locator against parties seeking to initiate title to the same premises.[15]

[13] Act of Aug. 1, 1912, 37 Stats. at Large, 242, 243.

[14] There is an *obiter* suggestion in Thornton v. Kaufman, 40 Mont. 282, 135 Am. St. Rep. 618, 106 Pac. 361, to the effect that the government may itself claim a forfeiture for nonperformance of annual labor, but as the law now stands this is clearly in error.

[15] Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 958, 20 Morr. Min. Rep. 591; Barklage v. Russell, 29 L. D. 401, 402; In re Wolenberg, 29 L. D. 302, 304; Marburg Lode Mining Claim, 30 L. D. 202, 206; Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 86, 68 L. R. A. 833, and note, q. v.; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 287; Knutson v. Fredlund, 56 Wash. 634, 106 Pac. 200, 202; Thornton v. Kaufman, 40 Mont. 282, 135 Am. St. Rep. 618, 106 Pac. 361, 362; Bingham Amalgamated Copper Co. v. Ute Copper Co., 181 Fed. 748, 750.

It is not a condition precedent to the obtaining of a patent;[16] nor has the land department anything to do with the determination of the question.[17] The government is not in a position to forfeit the right to the location if the annual labor is not performed, and in order to take advantage of the failure to represent the claim, the ground must be entered upon and relocated by another person.[18] But to preserve the claim from relocation the requirement as to annual labor is imperative.

While a timely resumption of work may prevent a relocation, the law contemplates that the labor or improvements, actual and valuable, to the amount of one hundred dollars in each year, computed from the first day of January next succeeding the date of location, should be performed in good faith.[19] There is probably no single provision of the law which is evaded to a greater extent than this one. While, of course, there are many exceptions, the average locator exhausts his ingenuity in attempting to avoid this

[16] Hughes v. Ochsner, 27 L. D. 396, 398; Nielson v. Champagne M. & M. Co., 29 L. D. 491, 493.

[17] Gaffney v. Turner, 29 L. D. 470, 474; Cleveland v. Eureka No. 1 G. M. & M. Co., 31 L. D. 69, 71; par. 53, Departmental Regulations, Appendix.

[18] Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 86, 68 L. R. A. 833, and note, q. v.; Knutson v. Fredlund, 56 Wash. 634, 106 Pac. 200. In Willitt v. Baker, 133 Fed. 937, 948, the circuit court took the manifestly erroneous position in an adverse suit that defendant (patent applicant), to be entitled to judgment, even where plaintiff's case fails, must prove that he did the assessment work for each year. The right of possession of a mining location is not dependent upon the performance of annual labor in the absence of a valid relocation by another.

[19] Morgan v. Tillottson, 73 Cal. 520, 15 Pac. 88, 89; Jackson v. Roby, 109 U. S. 440, 442, 3 Sup. Ct. Rep. 301, 27 L. ed. 990; Chambers v. Harrington, 111 U. S. 350, 353, 4 Sup. Ct. Rep. 428, 28 L. ed. 452; Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419, 420, 16 Morr. Min. Rep. 26; Goldberg v. Bruschi, 146 Cal. 713, 81 Pac. 23, 24.

plain and wholesome requirement. The courts are disposed to deal with these drones in the hive with much more leniency than they deserve. The statute is too frequently applied on sentimental lines. Forfeitures, say these tribunals, are odious, and in many cases the reluctance with which they enforce the law encourages, rather than deters, the systematic evasion of it.[20]

The statute is extremely liberal as to the time in which the specified amount of work shall be performed. To illustrate: A location made on January 1, 1897, may, in the absence of state laws or local rules requiring development work to be performed as an act of location, be held without a stroke of labor until December 31, 1898, and in no case is the period less than a full year. It would seem that a more rigid enforcement of the rule would not only command more respect for the law, but would, in a great degree, tend to promote the general object and intent of the mining statutes—the development of the mining resources of the country.

As was said by the supreme court of the United States, speaking through Justice Miller,—

> Clearly, the purpose was . . . . to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger.[21]

As it was in the days when mining privileges upon the public domain were governed by local rules, so it is now the invariable rule that the locator's only right

[20] *Post*, § 645.

[21] Chambers v. Harrington, 111 U. S. 350, 353, 4 Sup. Ct. Rep. 428, 28 L. ed. 452.

to possession depends upon the performance annually of the specified labor.[22] The grant flowing from a perfected valid location is only protected from liability to forfeiture by "representation."[23]

§ 625. Annual labor upon placer claims.—The language of the statute under consideration does not in terms specify that placer claims are to be subjected to the provisions of the law requiring the performance of annual labor. Acting Commissioner Curtis originally expressed the view that under the act of 1872 it was the intention of congress to require annual expenditures only upon lode, or vein, claims, leaving placers as they had been, previous to the passage of that act, subject to the operation of the local laws;[24] but later instructions issued by the land department insist that annual expenditures must be made upon placer claims as well as lode claims.[25]

The courts have uniformly held that the law was alike applicable to both classes of locations.[26] In section twenty-three hundred and twenty-nine of the Revised Statutes it is declared that claims usually called *placers* shall be subject to entry and patent under like circumstances and conditions and upon similar proceedings as are provided for vein or lode

[22] Du Prat v. James, 65 Cal. 555, 557, 4 Pac. 562, 563, 15 Morr. Min. Rep. 341.

[23] Renshaw v. Switzer, 6 Mont. 464, 13 Pac. 127, 128, 15 Morr. Min. Rep. 345.

[24] 1 Copp's L. O. 18.

[25] Min. Circ., March 24, 1887, 8 L. D. 505; Gen. Min. Reg., par. 25, Appendix.

[26] Carney v. Arizona G. M. Co., 65 Cal. 40, 2 Pac. 734, 735; Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. Rep. 301, 27 L. ed. 990; St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 650, 26 L. ed. 875, 11 Morr. Min. Rep. 673; Sweet v. Webber, 7 Colo. 443, 4 Pac. 752, 754; Morgan v. Tillottson, 73 Cal. 520, 15 Pac. 88, 89.

locations. This removes all doubt and ambiguity, if any exist, in the previous sections of the statutes.[27]

In Alaska, labor must now be performed on placer claims annually, including the year in which the location is made.[28]

§ 626. Supplemental state legislation.—By the terms of section twenty-three hundred and twenty-four of the Revised Statutes, which is but a re-enactment of section five of the act of May 10, 1872, the amount of work necessary to hold possession of a mining claim may be controlled by local regulation, subject, however, to the requirements of the federal law, that the amount shall be at least one hundred dollars each year for each claim. As we have heretofore observed, no state has a right to decrease the amount of labor which the congressional law requires to be done annually on a mining claim.[29] But states and territories, or the district organizations in the absence of state or territorial legislation, may increase the amount of such labor.[30]

Before passing to a discussion of the character of the work and improvements which will satisfy the law and preserve the locator's estate, it is advisable to briefly epitomize the nature of supplemental state and territorial legislation upon the subject. In doing so, we have at present no reference to the preliminary development work required by the several states and territories *as an act of location,* a subject fully dis-

27 Carney v. Arizona G. M. Co., 65 Cal. 40, 2 Pac. 734, 735.

28 Act of Aug. 1, 1912, 37 Stats. at Large, 242, 243. Instructions, 41 L. D. 347, 348.

29 *Ante,* § 250 (13), p. 560.

30 Sisson v. Sommers, 24 Nev. 379, 388, 77 Am. St. Rep. 815, 55 Pac. 829, 830; Northmore v. Simmons, 97 Fed. 386, 387, 38 C. C. A. 211, 20 Morr. Min. Rep. 128.

cussed in a preceding article.[31] We are to consider the scope of state legislation upon the subject of the *annual* or *assessment* work.

There is no legislation of this character in either Idaho, Montana or Utah.

In Arizona,[32] California,[33] Nevada,[34] North Dakota,[35] South Dakota,[36] and Washington,[37] provisions are found which in terms adopt the federal law. This, of course, gives no additional force to the requirements of the congressional law; but the effect is to prevent the adoption of local district regulations increasing the burdens imposed by the acts of congress.

New Mexico adopts the federal law with reference to placer claims but has no provisions fixing the amount or value of annual labor on lode claims.[38]

In Wyoming it is provided that the assessment work on placer claims shall consist in manual labor, permanent improvements made on the claim in buildings, roads, or ditches made for the benefit of working such claims, or after any manner, so long as the work accrues to the improvement of the claim or shows good faith and intention on the part of the owner, and his intention to hold possession of said claim.[39] The

31 *Ante*, §§ 343–346.

32 Rev. Stats. 1901, § 3239.

33 Civ. Code, § 1426 l.

34 Comp. Laws 1900, § 216; Rev. Laws 1912, § 2430, which also fixes the value of a day's labor at four dollars for eight hours.

35 Rev. Code 1885, § 1438; Id. 1899, § 1438; Id. 1905, § 1814.

36 Pol. Code Dak. 1887, p. 442, § 2009. Adopted by South Dakota—Laws 1890, ch. cv, § 1; Grantham's Ann. Stats. S. D., § 2668; Rev. Pol. Code 1903, § 2544.

37 Bal. Ann. Codes & Stats., § 3154; Laws 1899, p. 73, § 14; Rem. & Bal. Code 1909, § 7354. Placers, Laws 1899, p. 72, § 10 (3), as amended —Laws 1901, p. 292; Rem. & Bal. Codes 1909, § 7368.

38 Laws 1909, p. 191.

39 Rev. Stats. 1899, § 2554; Comp. Stats. 1910, § 3475.

remainder of the provisions on this subject in Wyoming are substantially the same as those of the federal law.[40]

In Colorado there is now no legislation on the subject as to either placer or lode claims. As to placers, the legislature in 1879 passed an act requiring that on each claim of one hundred and sixty acres, or more, there must be at least one hundred dollars' worth of work done annually before August 1st of each year; the amount of work on smaller claims to be in proportion, except that not less than twelve dollars' worth be done on any claim. Where two adjoining claims were owned by one person, the work might all be done on one claim. The work might consist of building or repairing ditches, or making other improvements.[41] This law was held by the supreme court of Colorado to contravene the federal law, and to be therefore void,[42] and it was later repealed by the legislature.[43] The objection to it is twofold. It limited the period in which the work was to be performed, and except where a claim embraces one hundred and sixty acres or more, required less work than is demanded under the congressional act.

In determining the validity of state legislation on this subject we must not overlook the fact that the public lands belong to the government; that the paramount proprietor is alone competent to prescribe rules for their primary disposal; that the individual states cannot interfere with this right, or exercise any privilege, unless under the terms of the federal law the

40 Rev. Stats. 1899, § 2555; as amended, Laws 1901, p. 105, § 2; Comp. Stats. 1910, § 3476.

41 Mills' Ann. Stats., § 3137.

42 Sweet v. Webber, 7 Colo. 443, 4 Pac. 752, 756.

43 Laws 1911, p. 515.

power is delegated to them. The scope of permissive state legislation is limited and defined by the congressional acts. Any attempt to exceed the privilege therein granted necessarily results in inoperative and void state legislation. The period during which states and local assemblages absolutely controlled the possession and right of enjoyment of the public mineral lands has long since passed into history. As we have heretofore said, if the state may prescribe any additional or supplemental rules, increasing the burdens or diminishing the benefits granted by the federal laws in lands of the public domain, it is simply because the government, as the owner of the property, sanctions, expressly or by implication, the exercise of such privileges.[44]

§ 627. Division of the subject.—Assuming that the nature and extent of annual labor and improvement which will suffice to perpetuate the estate of the locator is to be determined by reference solely to the federal laws, the subject may be considered in three different aspects:—

(1) Work done within the limits of a single location, or claim;

(2) Work done within the limits of a group of claims in furtherance of a common system of development;

(3) Work done outside of the boundaries of a claim, or group of claims.

§ 628. "Claim" defined.—Before entering upon a discussion of the subject of annual labor, it is necessary to determine what is meant by the word "claim," as used in section twenty-three hundred and twenty-four of the Revised Statutes, upon which the required work must be annually performed.

[44] *Ante*, § 249.

In a preceding section,[45] we have noted the different shades of meaning between "location" and "mining claim," and have there observed that if the miner has only the ground covered by one location, his "mining claim" and his location are identical, and the two designations may be indiscriminately used to denote the same thing. But if he acquires other adjoining "locations" and adds them to his own, then his "mining claim," colloquially speaking, may cover the ground embraced by *all* the locations.

In applying the law upon the subject of annual labor, it is obvious that this colloquial use of the terms is inapplicable. For example: A, B, and C each perfect a lode location on the same vein, the locations being contiguous. Each is required, under the law, to work, or represent, his individual claim to the extent of one hundred dollars annually. A subsequently purchases the locations of B and C, and the three locations may constitute his "claim," in a colloquial sense. But he will not be permitted thereafter to hold all three by performing simply one hundred dollars' worth of work within the limits of one, or distributing that amount in labor and improvements over the three. It is obvious that by purchasing from B and C he has simply stepped into their shoes, and the full amount of statutory work must be done upon each, or three hundred dollars' worth for all. The word "claim," as used in the statute, must, in this instance, necessarily mean "location," as if the statute read, on each *location*.[46] These terms are used interchangeably in the mining statutes.[47]

[45] *Ante*, § 327.

[46] Opinion of Assistant Attorney-General Van Devanter, 27 L. D. 91.

[47] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 74, 18 Sup. Ct. Rep. 894, 43 L. ed. 72, 19 Morr. Min. Rep. 370.

The same rule applies to placers. The unit of placer locations is, as we have heretofore observed, twenty acres.[48] But if appropriated by an association of persons, a location may include one hundred and sixty acres, or any less number, except in Alaska, where placer locations cannot now be made to exceed forty acres.[49]

The individual locator of a twenty acre tract must necessarily perform one hundred dollars' worth of labor on his claim annually. By a purchase of other contiguous locations, and thus augmenting his surface area, we do not see how he can be relieved from fulfilling the requirement as to every individual location which may be ultimately grouped and constitute his "mining claim," in a colloquial sense. If such a rule were to prevail,—as there is no limit to the number of claims which one may acquire by purchase,—he might hold five hundred or more acres with the aggregate annual expenditure of one hundred dollars, and thus practically defeat the purpose of the law.

A location by an association of persons, embracing more than twenty acres, may undoubtedly be perpetuated by the performance of the same amount of labor required of an individual locator. Work need not be done on each twenty acre tract of a location embracing one hundred and sixty acres made by such association.[50] But the appropriation by eight persons of one hundred and sixty acres is accomplished by one *location*. While this suggests an inequality of burdens, it is, in our judgment, the only consistent method of con-

[48] *Ante*, § 448.

[49] 37 Stats. at Large, 242 (Aug. 1, 1912).

[50] McDonald v. Montana Wood Co., 14 Mont. 88, 43 Am. St. Rep. 616, 35 Pac. 668, 669; Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 1086, 74 Pac. 444; S. C., in error, 197 U. S. 313, 25 Sup. Ct. Rep. 468, 49 L. ed. 770.

struing the statute. A lode claimant or an association of persons may locate a full claim of fifteen hundred feet in length. A location of less than the maximum would not decrease the burden as to the annual work. The volume of work is not gauged by the size of the claim located. There is no sliding scale adjusting the matter according to area. In determining, therefore, the amount of annual work to be performed in connection with an aggregation of locations, each *location* is to be considered as a *claim* within the meaning of the law, regardless of the superficial area comprised in any one or more of them.[51]

§ 629. Work done within the limits of a single location.—The object of the law requiring annual work is, that the holder of a mining claim shall give substantial evidence of his good faith.[52] The labor is not required to be applied in any particular manner, so long as it is unquestionably devoted to the claim. It must not be such as to raise a question as to its purpose.[53] This labor may be in excavating, erection of works for mining, and placing machinery.[54]

If work is actually done within the limits of the claim in good faith for the purpose of developing it, strict compliance with the requisite of the statute is established, and a court will not attempt to substitute its own judgment as to the wisdom and expediency of the method employed for developing the mine in place of that of the owner.[55]

51 See letter of commissioner of the general land office approving this construction. Mining and Scientific Press, vol. 78, p. 122.

52 Royston v. Miller, 76 Fed. 50, 52.

53 Lockhardt v. Rollins, 2 Idaho, 503, 509, 21 Pac. 413, 415, 16 Morr. Min. Rep. 16.

54 Id.

55 Mann v. Budlong, 129 Cal. 577, 62 Pac. 120; Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600, 603; Copper Mt. M. & S. Co. v. Butte etc. Co.,

It ought not to be difficult in investigating the character of work done upon a mining claim to determine whether it is legitimately done, with a view to develop or protect the claim, or whether it is merely a flimsy attempt to evade the law.

Commissioner Williamson, in a communication to the surveyor-general of Colorado, thus reflected the views of the land department:—

> All improvements made upon a mining claim having a direct relation to the development thereof may be taken into consideration. . . . . Any building, machinery, roadway, or other improvements used in connection with, and essential to the practical development of the claim will enter into and form a part of the expenditures for improvements. . . . . Necessarily, however, improvements of the character indicated must be associated with actual excavations, such as cuts, tunnels, shafts, etc., so as to clearly show that they are intended for use in connection with the claims under consideration.[56]

In this connection it should be borne in mind that, except in a few instances, the character of the work and improvements required to satisfy the statute relating to annual labor and the one relating to patent improvements is substantially the same,[57] and we can therefore gain considerable light on the question of the sufficiency of annual expenditures by referring to decisions of the department on matters involving the sufficiency of patent improvements.

A liberal construction should be given to the mining

39 Mont. 487, 133 Am. St. Rep. 595, 104 Pac. 540, 542. To the same effect, see Hughes v. Ochsner, 26 L. D. 540, 27 L. D. 396; Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 581.

[56] 7 Copp's L. O. 179.

[57] Zephyr et al. Min. Claims, 30 L. D. 510.

laws,[58] but it should not be so liberal as to authorize a claim to be held without representation.[59]

Labor and improvements, within the meaning of the statute, are deemed to be done on a mining claim or lode when the labor is performed or improvements made for the purpose of working, prospecting and developing the ground embraced in the location,[60] or for the purpose of facilitating the extraction of the mineral it may contain,[61] or the actual extracting of the mineral.[62]

Work done for the purpose of discovering mineral, whatever the particular form or character of the deposit which is the object of the search, is within the spirit of the statute.[63] Drill tests on placer ground, considered in connection with actual dredging operations on adjoining land, have been held to satisfy patent requirements, even though evidences of the drill tests have been allowed to be obliterated.[64] Diamond drill holes on lode claims have also been held to be

[58] McCulloch v. Murphy, 125 Fed. 147, 149; Whalen Cons. Copper Co. v. Whalen, 127 Fed. 611, 613.

[59] Remmington v. Baudit, 6 Mont. 138, 9 Pac. 819, 821; Honaker v. Martin, 11 Mont. 91, 27 Pac. 397, 398.

[60] Book v. Justice M. Co., 58 Fed. 106, 117, 17 Morr. Min. Rep. 617; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 218, 60 C. C. A. 155, 22 Morr. Min. Rep. 688, charge to jury.

[61] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 655, 26 L. ed. 875, 11 Morr. Min. Rep. 673; Justice M. Co. v. Barclay, 82 Fed. 554, 560; McCulloch v. Murphy, 125 Fed. 147, 149; Anvil Hydraulic & Drain Co. v. Code, 182 Fed. 205, 206, 105 C. C. A. 45; Floyd v. Montgomery, 26 L. D. 122, 132; Copper Glance Lode, 29 L. D. 542.

[62] Wailes v. Davies, 158 Fed. 667, 670; S. C., on appeal, 164 Fed. 397, 9 C. C. A. 385; Copper Mt. M. & S. Co. v. Butte etc. Co., 39 Mont. 487, 133 Am. St. Rep. 595, 104 Pac. 540, 542.

[63] Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 218, 60 C. C. A. 155, 22 Morr. Min. Rep. 688.

[64] Vance v. Calaveras Gold Dredging Co., decided by the secretary of the interior April 11, 1907 (unreported), and Vance v. Dennis, decided April 11, 1905, to the same effect (unreported).

satisfactory patent improvements.[65] Churn drill holes have also been credited as patent improvements.[66] Since the character of work required under section twenty-three hundred and twenty-four, Revised Statutes, for annual labor, and under section twenty-three hundred and twenty-five, Revised Statutes, for patent improvements, is practically the same, these drill hole decisions may be safely accepted as authority where the question of annual labor of a similar nature arises.[67] Whether drill holes on one claim of a group will count as group improvements is still a mooted question.[68] Work done within the limits of placer claims in search for lodes has been held to satisfy the law;[69] but when ground sought to be patented as placer is used exclusively for reservoir purposes for the storage of water to be conducted elsewhere, the cost of constructing such reservoir cannot be credited as work done on the claim.[70]

Picking rock from the walls of a shaft or from the outcroppings of a ledge, in small quantities from day to day, making tests for the purpose of sampling it, breaking and examining it under a glass, crushing it in a mortar and panning it out, carrying it away and making assays of it in an attempt to find the "pay shoot," is not such as the law will permit the claimant to be credited with upon his account for annual labor performed. Such labor does not add to the

65 In re McCornick, 40 L. D. 498.

66 Id. Ruling by the commissioner of the general land office, unreported.

67 See Zephyr et al. Min. Claims, 30 L. D. 510, 513.

68 See opinion of commissioner denying the group character of such work and referred to in East Tintic Cons. M. Claim, 40 L. D. 271; and see, also, In re McCornick, 40 L. D. 498.

69 United States v. Iron S. M. Co., 24 Fed. 568, 570.

70 Hale's Placer, 3 L. D. 536; Chessman's Placer, 2 L. D. 774.

value of the claim, nor does it tend to the development of the mine.[71]

In an early case in California it was held, construing a rule requiring two days' work in every ten, that *bona fide* efforts of the owners to procure machinery for working the claim might be justly considered as work done upon the claim by relation and intendment;[72] but this is a manifest straining of the law. In later years the same court held that time consumed and money expended for traveling, in an endeavor to arrange for the conduct of water to the claim for mining purposes, did not satisfy the law.[73]

Placing upon the ground mining tools,[74] implements, lumber,[75] and other material, which are not used to any extent and are subsequently removed, perhaps for the purpose of doing similar duty on some other location, is a mere sham and a fraud.[76]

In a case decided by the supreme court of Montana,[77] an ambulatory building intruded itself on the attention of the court, in regard to which Chief Justice Wade said:—

> An attempt seemed to have been made to make this house a sort of a traveling representation of mines wherever it went. If it could represent the Elmira claim, it might have represented the others as well. If building that house was one representation, taking it down might have been another; and so by building, taking down, and rebuilding that house the plaintiff might have represented all the

71 Bishop v. Baisley, 28 Or. 119, 41 Pac. 936.

72 Packer v. Heaton, 9 Cal. 569, 4 Morr. Min. Rep. 447.

73 Du Prat v. James, 65 Cal. 555, 4 Pac. 562, 564, 15 Morr. Min. Rep. 341.

74 Adams v. Quijada, 25 L. D. 24, 28.

75 Fredericks v. Klauser, 52 Or. 110, 96 Pac. 679, 682.

76 Honaker v. Martin, 11 Mont. 91, 27 Pac. 397, 399.

77 Remmington v. Baudit, 6 Mont. 138, 9 Pac. 819, 821.

mines in that district, and this process might go on for years, until sufficient building and rebuilding had been done to entitle the party to a patent before a stroke of work had been performed on the claim.

This class of cases illustrates the extremes to which locators will sometimes resort to save from relocation claims which they never intended to develop, and which they attempt to hold in utter defiance of the law.

It has been said that buildings erected upon mining claims may be considered as improvements. This is no doubt true if they were erected for any purpose reasonably connected with mining operations. The element of good faith is always important in the determination of questions involving the performance of annual labor,[78] and where the good faith of applicant is unquestioned, the department in estimating the values of improvements consisting of buildings erected for use in connection with active mining operations will take a liberal view,[79] though log cabins used by laborers have not been considered satisfactory.[80]

To make such a building an improvement under the annual-labor law, it must have been erected for the purpose of benefiting the claim and for its development. It is absurd to say that a building is an improvement on such claim when it is not, and was not intended to be, of any use or benefit to the claim.[81]

78 Kinsley v. New Vulture M. Co., 11 Ariz. 66, 90 Pac. 438, 439, 110 Pac. 1135.

79 Douglas et al. Lodes, 34 L. D. 556.

80 In re Dawson, 40 L. D. 17.

81 Bryan v. McCaig, 10 Colo. 309, 15 Pac. 413. The installation of bathhouses and use of the water for bathing in the case of a mining location containing saline springs does not satisfy the statutory requirement concerning improvements, since they are in no sense related to mining. Lovely Placer, 35 L. D. 426.

A stamp-mill, even though located upon and used exclusively in connection with that particular mining claim, is not a satisfactory improvement, for it does not facilitate the extraction of mineral from the claim;[82] and the same rule applies to a lime-kiln,[83] and to an excavation for the foundation of a smelter.[84]

A dredge purchased in good faith and placed on a group of placers for the exclusive purpose of extracting the mineral therefrom is a satisfactory improvement for the group.[85]

Roadways are necessities, and where such have been constructed on the claim for the manifest purpose of assisting in the development of the mine, such as transporting machinery and materials to and ore from the mine, it is a legitimate expenditure.[86] But manifestly such a roadway constructed for the purpose of reaching other properties would not satisfy the law.[87]

The land department is inclined to be more rigid in its test as to what are proper improvements, and would not credit the value of a wagon-road lying partly within and partly without the limits of a group of

[82] Monster Lode, 85 L. D. 493. The supreme court of California (Big Three M. & M. Co. v. Hamilton, 157 Cal. 130, 137 Am. St. Rep. 118, 107 Pac. 301, 305) tacitly approved an instruction which included a mill, cyanide plant, and waterworks, as proper expenditures for annual labor, though this question was not essential to the decision.

[83] Schirm etc. Placers, 37 L. D. 371.

[84] Fargo Group No. 2, 37 L. D. 404.

[85] Garden Gulch Placer, 38 L. D. 28.

[86] Doherty v. Morris, 17 Colo. 105, 28 Pac. 85. Rule approved in Nevada Exploration Co. v. Spriggs (Utah), 124 Pac. 770, 773; Emily Lode, 6 L. D. 220; Kinsley v. New Vulture M. Co., 11 Ariz. 66, 90 Pac. 438, 110 Pac. 1135; Sexton v. Washington M. & M. Co., 55 Wash. 380, 104 Pac. 614, 615.

[87] Gird v. California Oil Co., 60 Fed. 531, 541, 18 Morr. Min. Rep. 45; Copper Glance Lode, 29 L. D. 542; Douglas et al. Lodes, 34 L. D. 556.

claims and used to haul machinery to and ore from the group.[88]

The construction of a flume over premises claimed as a mining claim, and their use as a deposit for the waste material from an adjoining claim owned by the same person, is not such an expenditure as is required by law regulating the performance of annual work.[89]

The wages paid to a watchman employed to take care of and protect mining property while it is idle have been held to satisfy the law as to annual expenditure;[90] provided such services were necessary to preserve tunnels, buildings, or any structures erected to work the mine, and which would be necessary in case active work was resumed. But if there was only a naked claim to be looked after, and a watchman were placed there merely to warn prospectors, and thus prevent relocation, the rule would be different.[91]

As was said by the supreme court of California.—

> The cases must be rare in which it can justly be said that such money is expended in prospecting or working the mine. There may be cases where work has been temporarily suspended, and there are structures which are likely to be lost if not cared for, and it appears that the structure will be required when work is resumed, and that the parties do intend to resume work, in which money expended to preserve the structure will be on the same basis

88 Fargo Group No. 2 Lode Claims, 37 L. D. 404.

89 Jackson v. Roby, 109 U. S. 440, 445, 3 Sup. Ct. Rep. 301, 27 L. ed. 990.

90 Lockhart v. Rollins, 2 Idaho, 503, 21 Pac. 413, 415, 16 Morr. Min. Rep. 16, followed in Tripp v. Dunphy, 28 L. D. 14, 16.

91 Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. 1047, 1048, 18 Morr. Min. Rep. 410; Kinsley v. New Vulture M. Co., 11 Ariz. 66, 90 Pac. 438, 439, 110 Pac. 1135; Fredericks v. Klauser, 52 Or. 10, 96 Pac. 679, 682; Ingersol v. Scott (Ariz.), 108 Pac. 460.

as money expended to create them anew. But this could not go on indefinitely. As soon as it should appear that this was done merely to comply with the law and to hold the property without any intent to make use of such structures within a reasonable period, such expenditure could not be said to have been made in work upon the mine. Much less could the mine owner bring picks, shovels, and things of that kind, upon the mine, and have someone to watch them to prevent their being stolen, and have such cost of watching considered as work upon the mine.[92]

Whether or not the expenses of a keeper may be properly included as assessment work depends upon the circumstances of each case.[93]

Expenditures made in unwatering a mine might be considered in estimating the amount of annual work, if such unwatering was for the purpose of resumption of active operations. But where this class of work was done for the sole purpose of having an expert examination made preliminary to a proposed sale, we do not think such expenditure should be allowed.[94]

[92] Hough v. Hunt, 138 Cal. 142, 94 Am. St. Rep. 17, 70 Pac. 1059, 1060. This case is commented on and the statement made that much of the decision is *obiter*, although the principle announced was followed. Kinsley v. New Vulture M. Co., 11 Ariz. 66, 90 Pac. 438, 439, 110 Pac. 1135. See, also, Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600, 603; Merchants' Nat. Bank v. McKeown (Or.), 119 Pac. 334, 336. The presence of a watchman may, however, tend to show actual possession negativing an intention to abandon, where that issue is a material one, the annual work having been performed. Justice M. Co. v. Barclay, 82 Fed. 554, 562.

[93] Kinsley v. New Vulture M. Co., 11 Ariz. 66, 90 Pac. 438, 439, 110 Pac. 1135; Ingersol v. Scott (Ariz.), 108 Pac. 460, 461.

[94] Mooted, but not decided, Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036, 21 Morr. Min. Rep. 470; S. C., in error, *sub nom.* Yosemite M. Co. v. Emerson, 208 U. S. 25, 28 Sup. Ct. Rep. 196, 52 L. ed. 374; but the question has been finally decided in accordance with the text. Evalina G. M. Co. v. Yosemite G. M. & M. Co., 15 Cal. App. 714, 115 Pac. 946, 947.

Where work sought to be credited to a particular claim is also used to aid in the development of a number of claims in a group, the value of such work must be apportioned among the claims benefited and cannot be all credited to a single claim.[95]

§ 630. Work done within the limits of a group of claims in furtherance of a common system of development.—Long before patents were allowed, indeed from the earliest period in which mining for gold and silver was pursued as a business, miners were in the habit of consolidating adjoining claims, whether they consisted of one or more original locations, into one, for convenience and economy in working them.[96] This method of representing groups of claims was perpetuated by the act of May 10, 1872, and is found embodied in section twenty-three hundred and twenty-four of the Revised Statutes, which provides that, "where such claims are held in common, such expenditure may be made upon any one claim."

As was said by the supreme court of the United States,—

> It often happens that, for the development of a mine upon which several claims have been located, expenditures are required exceeding the value of a single claim, and yet without such expenditures the claim could not be successfully worked. In such cases it has always been the practice for the owners of the different locations to combine and work them as one general claim; and expenditures which may be necessary for the development of all the claims may then be made on one of them. . . . . In other words, the law permits a general system to be

[95] Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 287.

[96] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 653, 26 L. ed. 875, 11 Morr. Min. Rep. 673.

adopted for adjoining claims held in common, and in such case the expenditures required may be made or the labor be performed upon any one of them.[97]

In order to receive the benefit of this provision of the law, certain conditions are essential:—

(1) It has been ruled in several cases that the claims must be contiguous, so that each claim thus associated may in some way be benefited. This is the rule announced by the supreme court of the United States,[98] and followed or assumed in a number of subsequent cases in the courts and land department.[99] The supreme court of Colorado, however, is of the opinion that the decisions asserting or assuming the necessity for contiguity are mere *dicta,* and that contiguity is a nonessential;[100] and the supreme court of California says that undoubtedly the better authority supports the contention that assessment work may be done on

[97] Jackson v. Roby, 109 U. S. 440, 445, 3 Sup. Ct. Rep. 301, 27 L. ed. 990. See, also, De Noon v. Morrison, 83 Cal. 163, 23 Pac. 374, 16 Morr. Min. Rep. 33; McNeil v. Pace, 3 L. D. 267; Nicholas v. Becker, 11 L. D. 8; Dolles v. Hamberg Cons. M. Co., 23 L. D. 267; Axiom M. Co. v. White, 10 S. D. 198, 72 N. W. 462, 463; Yreka M. & M. Co. v. Knight, 133 Cal. 544, 65 Pac. 1091, 1094, 21 Morr. Min. Rep. 478; Little Dorrit G. M. Co. v. Arapahoe G. M. Co., 30 Colo. 431, 71 Pac. 389, 391; Big Three Mining & M. Co. v. Hamilton, 157 Cal. 130, 137 Am. St. Rep. 118, 107 Pac. 301, 304; Bakke v. Latimer, 3 Alaska, 95.

[98] Chambers v. Harrington, 111 U. S. 350, 353, 4 Sup. Ct. Rep. 428, 28 L. ed. 452.

[99] Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439, Fed. Cas. No. 9886, 9 Morr. Min. Rep. 616, 633; Royston v. Miller, 76 Fed. 50, 52; Gird v. California Oil Co., 60 Fed. 531, 541, 18 Morr. Min. Rep. 45; Copper Glance Lode, 29 L. D. 542, 547; Anvil Hydraulic & Drain Co. v. Code, 182 Fed. 205, 206, 105 C. C. A. 45; Morgan v. Myers, 159 Cal. 187, 113 Pac. 153, 154.

[100] Hain v. Mattes, 34 Colo. 345, 83 Pac. 127, 129.

one of a group of claims owned in common, even though the claims are not all adjoining.[1]

If work done outside of a group of claims can be credited to such group,[2] it would seem logical that work on a noncontiguous claim should be so credited, provided, of course, that the work responded to the general test of group development—that is, that the work done tends to develop all the claims in the group. Claims merely cornering are not contiguous.[2a]

(2) There must be a community of interest in each claim. This interest need not be of a strictly legal nature,[3] and different owners of adjoining claims can undoubtedly join in an agreement whereby a single shaft may be sunk or a tunnel driven on one of the claims for the joint benefit of the respective claims, even though not owned in common, and this will count as assessment work on all of the claims actually benefited, as being a part of a general plan or scheme of development.[4] But in the absence of such an agreement a cotenant in a group of claims cannot claim for them the benefit of work done by him on another claim or claims in which his co-owner has no interest.[5] It has been held that though the names of three persons claiming to hold three mines in common did not appear in the location notice of each mine, but each mine

1 Big Three Mining Co. v. Hamilton, 157 Cal. 130, 137 Am. St. Rep. 118, 107 Pac. 301, 305. Citing Altoona M. Co. v. Integral Co., 114 Cal. 100, 45 Pac. 1047, 1049, 18 Morr. Min. Rep. 410.

2 See § 631, *post*.

2a Tomera Placer Claim, 33 L. D. 560; Hidden Treasure Q. M., 35 L. D. 485.

3 Black Lead Lode Extension, 32 L. D. 595; Golden Crown Lode, 32 L. D. 217.

4 Merced Oil Co. v. Patterson, 153 Cal. 624, 96 Pac. 90; Hawgood v. Emery, 22 S. D. 573, 133 Am. St. Rep. 941, 119 N. W. 177, 178.

5 Id.

was located in the name of one of such persons, and the legal title to each was therefore in the respective locator, all the locations having been made under an oral agreement that they should be located for the common benefit, each locator had such an equitable interest in the others as to make the work done on one mine for the development of the three satisfy the mining laws, if sufficient in quantity and value;[6] but where a number of persons located fifteen hundred feet upon a lode, dividing the same into three parcels held in severalty, work done upon one of the parcels will not inure to the benefit of the others.[7] There was a severance of the community of interest, and each parcel constituted a separate claim.[8]

(3) The aggregate amount of the expenditure of money or labor on one claim must equal in value that which would be required on all the claims if they were separate or independent.[9]

The same rule is recognized and followed by the land department in estimating value of the expenditures for patent purposes in cases of group applications.[10]

6 Eberle v. Carmichael, 8 N. M. 169, 42 Pac. 95.

7 Zeckendorf v. Hutchinson, 1 N. M. 476, 9 Morr. Min. Rep. 483.

8 The department has held that when a common improvement has been constructed sufficient in value for patent purposes for the entire group, and subsequent to the patenting of a part of the group there has been a sale of the patented claims, thus destroying the community of interest, the remaining claims may still be patented in reliance on the original construction of the common improvement. Mountain Chief No. 8 Lode, 36 L. D. 100.

9 Chambers v. Harrington, 111 U. S. 350, 353, 4 Sup. Ct. Rep. 428, 28 L. ed. 452; Eberle v. Carmichael, 8 N. M. 169, 42 Pac. 95, 97; Axiom M. Co. v. White, 10 S. D. 198, 72 N. W. 462; Duncan v. Eagle Rock G. M. Co., 48 Colo. 569, 139 Am. St. Rep. 288, 111 Pac. 588, 594; Copper Glance Lode, 29 L. D. 542; Golden and Cord Mining Claims, 31 L. D. 178, 181; Sweeney v. Northern Pac. R. R., 20 L. D. 394; Good Return M. Co., 4 L. D. 221; In re Kinkaid, 5 L. D. 25.

10 *Post*, § 673. A common improvement is defined by the depart-

(4) The work performed or improvements made must manifestly tend to the development of all the claims in the group.[11] The burden of proof is on the owner to show that the work done or improvement made does, as a matter of fact, tend to the development of the property as a whole, and that such work is a part of the general scheme of improvement.[12]

Such is the rule applied where work is done outside of the claims for the benefit of an entire group.[13]

As to the nature and character of the work required to be performed, what we have said in a preceding

ment to be one made on several contiguous mining claims held in common and intended to be and which is of such a character as to benefit all. Such an improvement is not subject to physical subdivision into segments and apportionment to specific claims, but the group of claims benefited participate in the value collectively and not individually. In re Carretto, 35 L. D. 361; Mountain Chief No. 8 Lode, 36 L. D. 100; In re Dawson, 40 L. D. 17; Duncan v. Eagle Rock G. M. Co., 48 Colo. 569, 109 Am. St. Rep. 288, 111 Pac. 588, 594. Where succeeding the construction of the common improvement other claims are located, the department allows the requisite value necessary to patent the new claims only to be added to the common improvement, and does not require the apportionment of such additional work among the original claims. Aldebarran Mining Co., 36 L. D. 551.

11 McCormick v. Baldwin, 104 Cal. 227, 37 Pac. 903, 904; Jackson v. Roby, 109 U. S. 440, 445, 3 Sup. Ct. Rep. 301, 27 L. ed. 990; In re Folsom, 16 Copp's L. O. 279; Axiom M. Co. v. White, 10 S. D. 198, 72 N. W. 462, 463; Copper Glance Lode, 29 L. D. 542; In re Cassel, 32 L. D. 85; Wood Placer M. C. (on review), 32 L. D. 401; Lawson Butte Cons. Copper Mine, 34 L. D. 655; Big Three M. & M. Co. v. Hamilton, 157 Cal. 130, 137 Am. St. Rep. 118, 107 Pac. 301, 305; Copper Mt. M. & S. Co. v. Butte & Corbin Cons. C. & S. Co., 39 Mont. 487, 133 Am. St. Rep. 595, 104 Pac. 540, 541.

12 Dolles v. Hamberg Cons. M. Co., 23 L. D. 267; Copper Glance Lode, 29 L. D. 542; Copper Mt. M. & S. Co. v. Butte & Corbin Cons. C. & S. Co., 39 Mont. 487, 133 Am. St. Rep. 595, 104 Pac. 540, 541. Whether drill holes on one quartz claim can be credited to adjoining claims is a mooted question. See East Tintic Cons. M. Co., 40 L. D. 271, and In re McCornick, 40 L. D. 498.

13 Justice M. Co. v. Barclay, 82 Fed. 554, 560; Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580; Hall v. Kearny, 18 Colo. 505, 33 Pac. 373; Merchants' Nat. Bank v. McKeown (Or.), 119 Pac. 334, 335.

section with reference to single locations applies with equal force to group claims. The quality required in both instances is the same, but the quantity in the case of groups depends upon the number of claims sought to be represented by means of a common system of development.

As to whether work done upon one claim for the benefit of a group does so benefit all the claims is a question of fact.[14]

The land department has formulated a series of deductions from the adjudicated cases as to work done outside of a group of claims for the common benefit of all the claims which embrace the principles herein discussed. These deductions will be found in the next section.

With regard to work done within one placer claim for the benefit of a group of contiguous claims, it is not easy to formulate rules specifically applicable to that class of locations, and some difficulty is found in applying rules which are peculiar to group lode claims. This embarrassment is encountered in the oil regions of California, where the product is reached by means of bored wells. It may be said that a fully equipped well on one twenty-acre tract has a tendency to develop many others adjoining,—that is, the oil brought to the surface from one tract is supplied, to some extent at least, from those immediately adjoining, but it is impossible to define the limit within which such a rule might be operative. In a report submitted to the lower house of congress by the committee on mines

[14] Yreka M. & M. Co. v. Knight, 133 Cal. 544, 65 Pac. 1091, 1094, 21 Morr. Min. Rep. 478; Big Three M. & M. Co. v. Hamilton, 157 Cal. 130, 137 Am. St. Rep. 118, 107 Pac. 301, 305; Copper M. & M. Co. v. Butte & Corbin Cons. C. & S. Co., 39 Mont. 487, 133 Am. St. Rep. 595, 104 Pac. 540, 541; Anvil Hydraulic & Drainage Co. v. Code, 182 Fed. 205, 206, 105 C. C. A. 45.

and mining, it was said that the land department was of the opinion that the annual labor upon this class of claims must be done upon each location. In an attempt to obviate this an act was passed by congress, February 12, 1903, which provides as follows:—

> That where oil lands are located under the provisions of title thirty-two, chapter six, Revised Statutes of the United States, as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not exceeding five claims in all; *provided,* that said labor will tend to the development or to determine the oil-bearing character of such contiguous claims.[15]

To what extent this relieves the situation or establishes a rule different from the general law applicable to group work generally is difficult to point out.

In the case of a group of placer claims containing marble it has been held that quarrying marble from one claim does not benefit the others,[16] and the same rule has been held applicable to a group of "gulch" placers, and work on the lower end of the group could not be credited to the other claims above.[17] When a

[15] 32 Stats. at Large, 825, 10 Fed. Stats. Ann. 236; U. S. Com. Stats. (Supp. 1905), § 2333.

[16] In re Cassel, 32 L. D. 85; Schirm-Casey et al. Placers, 37 L. D. 371.

[17] Wood Placer M. Claims, 32 L. D. 401. We can, however, conceive of circumstances where it is essential to work from the lower end of a placer deposit and keep working upstream in order to economically extract the deposits lying upstream, and in such a case work below certainly has a tendency to facilitate the extraction of the mineral from claims upstream. In the early days of placer mining the fact that certain placer claims were situated on the back portion of river-bars away from the stream frequently furnished a valid excuse for not working these back claims until the claims fronting on the river had first been worked and the back claims rendered accessible, so that economic working was possible.

dredge has been placed in good faith on a group of placers for the sole purpose of working such deposits, the improvement has been held satisfactory for patent purposes.[18]

§ 631. Work done outside of the boundaries of a claim or group of claims.—By an act passed February 11, 1875, commonly known as the "tunnel amendment,"[19] section twenty-three hundred and twenty-four of the Revised Statutes was amended,—

> So that where a person or company has, or may run, a tunnel for the purpose of developing a lode or lodes owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act, and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act.

This act did not affect the character of other work to be done or improvements to be made according to law as it stood before, except as it gave special value to working by tunnel.[20] The land department held, prior to the passage of this amendment, that development by means of a tunnel satisfied the law,[21] although a contrary rule had been previously announced by Commissioner Drummond.[22]

A tunnel-site located under section twenty-three hundred and twenty-three of the Revised Statutes may

[18] Garden Gulch Bar Placer, 38 L. D. 28.

[19] 18 Stats. at Large, p. 315; Comp. Stats. 1901, p. 1427; 5 Fed. Stats. Ann. 21.

[20] Chambers v. Harrington, 111 U. S. 350, 355, 4 Sup. Ct. Rep. 428, 28 L. ed. 452.

[21] In re Coleman, 1 Copp's L. O. 34.

[22] Copp's Min. Dec. 136, 142.

be utilized for development purposes. One may lose the right to the tunnel-site (as a means of discovery) by failure to prosecute the work with reasonable diligence. Yet the work thereon may be credited on assessment work on claims which are in fact benefited by it,[23] the prerequisite conditions of contiguity and community of interest being present.[24]

But it is necessary that the work shall be probably advantageous to all the claims sought to be benefited.[25] It has been held that where tunnels or drifts are claimed to be group improvements, the claimant must show ownership or control over the land to be penetrated, and that an extralateral right to follow a vein down from adjoining ground on its dip does not give such owners a subsurface right to crosscut or extend his workings to intersect the vein underneath surface owned by someone else. He must either follow down on his vein or secure a right of way through subsurface territory not owned by him.[26] Underneath public land not claimed by anyone he could undoubtedly prosecute such work and acquire an easement at least when the work was completed, and in states where mining is a public use, condemnation proceedings would enable him to secure his right of way and thus render it possible for him to prosecute work outside of his claims

23 Fissure M. Co. v. Old Susan M. Co., 22 Utah, 438, 63 Pac. 587, 588, 21 Morr. Min. Rep. 125.

24 This paragraph of the text quoted with approval, In re Dawson, 40 L. D. 17.

25 Morgan v. Myers, 159 Cal. 187, 113 Pac. 153.

26 Patten v. Conglomerate M. Co., 35 L. D. 617. See, also, St. Louis M. & M. Co. v. Montana M. Co., 113 Fed. 900, 64 L. R. A. 207, 51 C. C. A. 530, 22 Morr. Min. Rep. 127; S. C., 194 U. S. 235, 24 Sup. Ct. Rep. 654, 48 L. ed. 953. But see *contra*, Hain v. Mattes, 34 Colo. 345, 83 Pac. 127, and Godfrey v. Faust, 20 S. D. 203, 105 N. W. 460, where the driving of a tunnel largely through foreign ground was credited to annual work, applying the analogy of a wagon-road.

and entitle it to be credited. In other states, where condemnation for mining purposes is not recognized and the surface of intervening ground privately owned by others, in the absence of an agreement permitting such work to be continued underneath such intervening ground, there is a valid reason for not crediting it to the claims thus separated from it.

The rule is well settled that work done outside of a claim or group of claims, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim or claims as if done within the boundaries. One general system may be formed, well adapted and intended to work several contiguous claims or lodes, and when such is the case, work in furtherance of the system, whether done within or without the claim or claims, is work on the claims intended to be developed.[27]

[27] Text quoted with approval in Godfrey v. Faust, 20 S. D. 203, 105 N. W. 460, and see Hawgood v. Emery, 22 S. D. 573, 133 Am. St. Rep. 941, 119 N. W. 177; Nevada Ex. & M. Co. v. Spriggs (Utah), 124 Pac. 770, 772; Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439, 457, Fed. Cas. No. 9886, 9 Morr. Min. Rep. 616; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 116, 11 Fed. 666, 682, 4 Morr. Min. Rep. 411; Jackson v. Roby, 109 U. S. 440, 445, 3 Sup. Ct. Rep. 301, 27 L. ed. 990; St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 653, 26 L. ed. 875, 11 Morr. Min. Rep. 673; De Noon v. Morrison, 83 Cal. 163, 23 Pac. 374, 16 Morr. Min. Rep. 33; Chambers v. Harrington, 111 U. S. 350, 354, 4 Sup. Ct. Rep. 428, 28 L. ed. 452; Remmington v. Baudit, 6 Mont. 138, 9 Pac. 819, 820; Harrington v. Chambers, 3 Utah, 94, 1 Pac. 362, 371; Packer v. Heaton, 9 Cal. 568, 4 Morr. Min. Rep. 447; Hall v. Kearney, 18 Colo. 505, 33 Pac. 373, 374; Doherty v. Morris, 17 Colo. 105, 28 Pac. 85, 86; United States v. Iron S. M. Co., 24 Fed. 568; Kramer v. Settle, 1 Idaho, 485, 9 Morr. Min. Rep. 561; Eberle v. Carmichael, 8 N. M. 169, 42 Pac. 95, 97; Book v. Justice M. Co., 58 Fed. 106, 117, 17 Morr. Min. Rep. 617; English v. Johnson, 17 Cal. 107, 76 Am. Dec. 574, 12 Morr. Min. Rep. 202; Gird v. California Oil Co., 60 Fed. 531, 541, 18 Morr. Min. Rep. 45; Royston v. Miller, 76 Fed. 50, 52; Taylor v. Parenteau, 23 Colo. 368, 48 Pac. 505, 507, 18 Morr.

Work done outside of the claim upon another patented claim, if for the benefit of the one unpatented, may be considered as work done upon it.[28] In cases of consolidation of claims, it is not necessary, in order to have its due share of such work or improvements credited to each claim, that such group of claims should all be embraced in the same proceedings for patent. If the mining laws are complied with in other respects, such claims may be applied for and entered singly or otherwise, and at different times, without in any way impairing the right to have the value of such share credited to them respectively.[29] But where improvements not situated upon the claim are alleged to have been made for the development of such claim, it must be clearly demonstrated that such improvements have a direct tendency to such development.[30] They must have direct relation to the claim, or be in reasonable proximity to it.[31]

The labor or improvements to be so credited must actually promote the extraction of mineral from the

Min. Rep. 534; Strasberger v. Beecher, 20 Mont. 143, 49 Pac. 740, 743; Justice M. Co. v. Barclay, 82 Fed. 554, 561; Klopenstine v. Hays, 20 Utah, 45, 57 Pac. 712, 714; Power v. Sla, 24 Mont. 243, 61 Pac. 468, 471; Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 581; Kirk v. Clark, 17 L. D. 190; Emily Lode, 6 L. D. 220; Zephyr Lode Claim, 30 L. D. 510; Copper Glance Lode, 29 L. D. 542; Willett v. Baker, 133 Fed. 937, 948; Copper Mt. M. & S. Co. v. Butte & Corbin Co., 39 Mont. 487, 133 Am. St. Rep. 595, 104 Pac. 540, 541; Snowy Peak M. Co. v. Tamarack etc. Co., 17 Mont. 630, 107 Pac. 60, 63; Duncan v. Eagle Rock G. M. & R. Co., 48 Colo. 569, 139 Am. St. Rep. 288, 111 Pac. 588, 594; Bakke v. Latimer, 3 Alaska, 95, 98.

[28] Hall v. Kearny, 18 Colo. 505, 33 Pac. 373; Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580; Copper Mt. M. & S. Co. v. Butte & Corbin Co., 39 Mont. 487, 133 Am. St. Rep. 595, 104 Pac. 540.

[29] Zephyr Lode Mining Claim, 30 L. D. 510; Mountain Chief Nos. 8 and 9 Lode Claims, 36 L. D. 100.

[30] Louise M. Co., 22 L. D. 663; Clark's Pocket Quartz Mine, 27 L. D. 351.

[31] McGarrity v. Byington, 12 Cal. 426, 432, 2 Morr. Min. Rep. 311.

land, or forward or facilitate the development of the claim as a mine or mining claim, or be necessary for its care or the protection of the mining works thereon or pertaining thereto.[32]

An artificial change of the physical conditions of the earth, in, upon or so reasonably near a mining claim as to evidence a design to discover mineral therein or to facilitate its extraction, is usually contemplated, and the improvement should be reasonably permanent in character.[33]

It is hardly necessary to enumerate the various methods by which mines may be worked under a common system, necessitating the performance of labor or the erection of improvements outside the boundaries of a claim or claims. It is not within the province of the courts to question the judgment of a property owner in the legitimate use of his property, or to determine whether one mode of use would be more beneficial than another.[34] It depends largely upon local environment and the character of the ground to be developed. However, the work must have some reasonable relation or adaptation to its alleged purpose, even when performed in good faith,[35] and such that if continued will lead to the development or discovery of ore in the claims or facilitate the extraction of the ores.[36]

32 Highland Marie and Marcella Lodes, 31 L. D. 37; Douglas et al. Lode Claims, 34 L. D. 556.

33 Fredericks v. Klauser, 52 Or. 110, 96 Pac. 679, 682.

34 Stone v. Bumpus, 46 Cal. 218, 4 Morr. Min. Rep. 278; Mann v. Budlong, 129 Cal. 577, 62 Pac. 120; Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600, 602; Copper Mt. M. & S. Co. v. Butte & Corbin Cons. Co., 39 Mont. 487, 133 Am. St. Rep. 595, 104 Pac. 540, 542; Nevada Exploration Co. v. Spriggs (Utah), 124 Pac. 770, 773.

35 Copper Mt. M. & S. Co. v. Butte & Corbin Cons. Co., 39 Mont. 487, 133 Am. St. Rep. 595, 104 Pac. 540, 542.

36 Nevada Exploration & Mining Co. v. Spriggs (Utah), 124 Pac. 770, 773.

The ownership, cost, topographical situation[37] of the shaft, tunnel, or other workings will be subject to inquiry as to whether it tends in a greater or less degree, or at all, to the development of all the locations as required by the law.[38]

Obviously, a tunnel, the portal of which is situated at a higher elevation than some of the claims in a group and projected in a direction away from them, could hardly aid in the development of such lower claims.[39]

As water is essential to the development and working of placers, expenditures made in constructing ditches, flumes, and pipe-lines, for the purpose of conducting water to the property for *use on such property,* will undoubtedly satisfy the law. The cost of a survey preliminary to the location of a ditch for the development of the claim will not, however, be credited on the required statutory expenditure, where the ditch has not been dug.[40]

Dams and reservoirs constructed upon outside lands, for the purpose of storing water or acquiring requisite pressure, the water to be conducted from such dams or reservoirs to, and used upon, the mining claim, are certainly legitimate expenditures, to be credited upon the claim where the water is used or to be used, although the cost of constructing such dams

37 For a case stating that in some instances topographical conditions are important elements to be considered, see Morgan v. Myers, 159 Cal. 187, 113 Pac. 153, 154.

38 Hughes v. Ochsner, 27 L. D. 396; Douglas et al. Lode Claims, 34 L. D. 556; Lawson Butte Cons. Copper Mine, 34 L. D. 655. For an instance where a claimant was refused credit for a tunnel constructed underneath a part of the claim which was subsequently lost in adverse proceedings, see Russell v. Wilson Creek Cons. M. Co., 30 L. D. 322.

39 Lawson Butte Cons. Copper Mine, 34 L. D. 655.

40 Stork & Heron Placer, 7 L. D. 359.

under such circumstances could not be credited to the land upon which they were constructed.[41]

So a flume constructed for the purpose of carrying away tailings and waste material from a claim may be credited to the claim from which the material is taken in the conduct of mining operations; but is not considered as labor performed or improvements made upon the land whereon the flume is erected or tailings deposited.[42]

A ditch constructed and actually reaching a claim, but not used or intended to be used in connection with it, is not work for which the claim is entitled to credit.[43]

As we have heretofore observed, roadways are necessary,[44] and where constructed in good faith and for the manifest purpose of aiding in the conduct of mining operations on the particular claims sought to be represented by this character of work, the cost of their construction in connection with active mining operations may be entitled to consideration; but this rule is to be applied cautiously and on the lines of obvious common sense. In a general way, all roads within a mining district are convenient and necessary; but to say that work done upon the general highways within a mining district may be done by mining locators and applied in lieu of assessment work on their respective claims would be absurd.[45] A road

[41] Hale's Placer, 3 L. D. 536; Chessman's Placer, 2 L. D. 774.

[42] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 653, 26 L. ed. 875, 11 Morr. Min. Rep. 673; Jackson v. Roby, 109 U. S. 440, 445, 3 Sup. Ct. Rep. 301, 27 L. ed. 990.

[43] In re Downs, 7 L. D. 71; Trickey Placer Claim, 7 L. D. 52. See the case of Anvil Hydraulic & Drainage Co. v. Code, 182 Fed. 205, 206, 105 C. C. A. 45.

[44] *Ante*, § 629.

[45] Gird v. California Oil Co., 60 Fed. 531, 542, 18 Morr. Min. Rep. 45. Note the statute of the state of Washington relating to the sub-

is not *necessarily* a mining improvement. The construction of a road, no portion of which is on the claim, and which is not intended to be used in connection with such claim, cannot be accepted as a compliance with the law relative to annual expenditure.[46]

The connection between the outlying portions of roads and active mining operations should be intimate and not remote.[47]

The cost of constructing a smelting furnace at which ores from a large number of claims was reduced cannot be estimated in determining the amount of annual labor to be applied to claims noncontiguous to other claims;[48] or in fact to the claim upon which the smelter is erected,[49] and the same rule is applied to a quartz-mill similarly situated and used.[50]

In the case of buildings such as boarding-houses, bunk-houses, stables, blacksmith-shops and structures of a like nature, the department is disposed to be lib-

ject of road work in organized mining districts (see Appendix), discussed in Sexton v. Washington M. & M. Co., 55 Wash. 380, 104 Pac. 614, 615.

46 White Cloud C. M. Co., 22 L. D. 252. See, also, Alice Edith Lode, 6 L. D. 711; Copper Glance Lode, 29 L. D. 542.

47 Douglas et al. Lode Claims, 34 L. D. 556. See, also, Fargo Group No. 2 Lode Claims, 37 L. D. 404, 407, holding that neither the outlying portion nor the segment of a road embraced within the boundaries of a group of claims, such road being used solely for the purpose of hauling supplies to and ores from the mine, could be credited as a patent improvement, since it is not intimately enough connected with mining operations.

48 Copper Glance Lode, 29 L. D. 542.

49 Monster Lode M. Co., 35 L. D. 493. And *a priori* an excavation for a smelter cannot be so applied. Fargo Group No. 2 Lodes, 37 L. D. 404.

50 Highland Marie and Marcella Lodes, 31 L. D. 37. A stamp-mill, even though used exclusively in connection with the claim upon which it is situated, is not a satisfactory patent improvement. Monster Lode Min. Claims, 35 L. D. 493. And the same rule applies to lime-kilns. Schirm-Carey et al. Placers, 37 L. D. 371.

eral in cases where good faith is shown and the buildings are actually used for some purposes connected with the conduct of active mining operations on the group,[51] and the courts will doubtless take the same view where questions involving the performance of annual labor are presented to them.

Considering the manifest object and purpose of the law requiring annual development work as a condition upon which the locator's estate is to be perpetuated, the courts and the land department will readily discriminate between a *bona fide* effort to fulfill its requirements and a fraudulent attempt to evade it, and this applies to work done, or pretended to be done, without as well as within the limits of a particular claim or group of claims. The tribunals do not measure a locator's acts by hard-and-fast lines, but they will readily detect the difference between the genuine and the sham. Where work is done outside of a claim or group of claims which the claimant asserts benefits the respective claims, the burden rests upon him to establish the fact of such benefit.[52]

The secretary of the interior, after a review of most of the authorities cited in this and in the preceding section, deduced the following rules defining the circumstances under which work might be done outside of a group of claims for the benefit of all of the claims within the group; likewise covering to some extent the character of the work and the conditions under which it may be credited where done on one claim for the benefit of a number of contiguous claims:—

(1) Labor and improvements, within the meaning of the statute, are deemed to have been had upon a

[51] Douglas et al. Lode Claims, 34 L. D. 556.

[52] Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 581; Justice M. Co. v. Barclay, 82 Fed. 554, 560; Hall v. Kearny, 18 Colo. 505, 33 Pac. 373, 374; Fredericks v. Klauser, 52 Or. 110, 96 Pac. 679, 681.

mining claim, or upon several claims held in common, when the labor is performed or the improvements are made in order to facilitate the extraction of minerals from the claim, or the claims in common, as the case may be, though such labor and improvements may in fact be outside the limits of the claim, or claims in common, or on only one of the several claims held in common;

(2) In order that labor performed or improvements made upon one of several mining claims held in common, or upon ground outside the limits of such claims, may be accepted in satisfaction of the statute as to all the claims so held, such claims must be adjoining or contiguous, so that each claim thus associated may be benefited by the work done or improvements made;[53]

(3) Where expenditure in labor or improvements relied on is had on one only of several adjoining or contiguous claims held in common, it is incumbent upon the applicant for patent to the claims so held to show that such expenditure was intended to aid in the development of all the claims, and that the labor and improvements are of such a character as to redound to the benefit of all;

(4) Where the labor and improvements are not upon the claim, or upon any of several adjoining or contiguous claims held in common, but outside thereof, it is likewise incumbent upon the applicant for patent to such claim or claims in common to show that the labor and improvements were intended to aid in the development of the claim, or claims in common, as the case may

[53] And where there are several co-owners, each must be shown to have an interest in every claim in the group sought to be benefited by the common system of development. Black Lead Extension, 32 L. D. 595; Golden Crown Lode, 32 L. D. 217.

be, and are of a character suitable for the purposes intended;

(5) Labor or improvements intended for the common benefit of several noncontiguous mining claims cannot be apportioned to the different claims in satisfaction of the required expenditure thereon, for the reason that to do so would be to credit each claim with an expenditure made in part for the benefit of other claims not associated therewith as claims held in common within the meaning of the law.[54]

§ 631a. **Work upon placer claims containing lodes located by placer claimant.**—It frequently happens that lodes are discovered and known to exist within the limits of a placer claim. As such they are subject to location the same as if they were situated elsewhere, subject only to diminution in surface side-line area.[55] Where they are located and claimed by strangers to the placer title, there can be no question but that annual labor must be performed on the lode claim to the same extent as if without the placer. Where both placer and lode claims are held in the same ownership, however, the inquiry has been made as to whether work done upon the placer only would be sufficient. There is no judicial or departmental ruling on the subject, but the answer seems obvious. The lode claim within the placer is a distinct claim, subject to patent as a lode claim separate from the placer. In applications for patent to placer claims, including applications for patent for the known lodes embraced therein, the land department requires a showing of five hundred dollars improvements upon the placer and a like amount on each lode claim

[54] Copper Glance Lode, 29 L. D. 542, 549.

[55] *Ante*, §§ 443, 445.

within the placer.[56] Applying the analogy to annual assessment work, it is clear that assessment work must be done on the lode claims in addition to the work on the placer.

§ 632. Period within which work must be done—Can preliminary work required by state laws as an act of location be credited on the first year's work? The law fixes no time within the year when the work must be done. Consequently, if done at any time during the year, it is enough, and there can be no forfeiture until the entire year has elapsed.[57]

It may be conceded that either by state legislation, or, in its absence, by local district regulation, the amount of the annual work prescribed by the federal law may be increased, and as to such increased amount the states or districts may fix any reasonable time within which such additional work may be performed, regardless of the period fixed by the federal law, within which the requirement of the law may be fulfilled.[58]

But may the states or local districts lawfully require that any part of the annual work required by the federal law should be performed within a shorter period than that specified in the federal statute,—i. e., within the year from January 1st next succeeding the date of the location? In the case of the Original

[56] Ute Placer and the Oregon and Other Lode Claims (unpublished), Oct. 6, 1906, secretary of interior.

[57] Belk v. Meagher, 3 Mont. 65, 1 Morr. Min. Rep. 522; S. C., on appeal, 104 U. S. 279, 283, 26 L. ed. 735, 1 Morr. Min. Rep. 510; McGinnis v. Egbert, 8 Colo. 41, 47, 5 Pac. 652, 658, 15 Morr. Min. Rep. 329; Atkins v. Hendree, 1 Idaho, 95, 2 Morr. Min. Rep. 328; Hall v. Hale, 8 Colo. 351, 8 Pac. 580, 581; Mills v. Fletcher, 100 Cal. 142, 34 Pac. 637, 639; Slavonian M. Co. v. Vacavich, 7 Saw. 217, 7 Fed. 331, 332, 1 Morr. Min. Rep. 541.

[58] *Ante*, § 250 (13).

Mining Company v. Winthrop Mining Company,[59] the supreme court of California held that a local regulation requiring work to be performed every sixty days contravenes the federal law and is void.

The majority of the circuit court of appeals of the ninth circuit, in the case of Northmore v. Simmons,[60] criticises the doctrine of the California case, holding it to be in conflict with the weight of authority and to be opposed to the plain meaning of the statute. Judge Ross, in a dissenting opinion, contends that the exact reverse is true, and that the decision of the supreme court of California gives force and effect to the federal statute by declaring invalid a local rule inconsistent therewith.

If the facts of the case in Northmore v. Simmons justified the deduction that the local rule there involved applied only to such preliminary development work as an act of location, there would not necessarily be any conflict between the two cases, and both could be sustained on principle.[61]

But the work to be performed under the local rule which was before the federal court seems to have been treated by that tribunal as a part of the annual labor required by the federal statute, and in this aspect there is a sharp conflict between the two courts.

As above stated, the year within which work is to be performed is the calendar year commencing with the first day of January next succeeding the date of the location, and ending with the thirty-first day of December. A location made on January 1, 1903, need not be represented until December, 1904, thus permitting the claim to be held practically two years, without

[59] 60 Cal. 631.

[60] 97 Fed. 386, 389, 38 C. C. A. 211, 20 Morr. Min. Rep. 128.

[61] *Ante*, § 344.

the necessity of performing any work whatever, except such preliminary development as may be required by the laws of the several states as an act of location.[62]

As to whether or not work performed during the year in which the location is made,—that is, prior to the first day of January next succeeding the date of the location,—may be credited on the first year's representation, is a matter involved in some doubt. Logically, we can see no objection to the locator performing the full amount of the first year's labor at any time after the inception of his right by discovery. While his location is not perfected until all the requisite acts are performed, yet when completed his rights relate back to the date of his discovery, and that should be considered as the date of his location, as it is the inception of his right.[63] The object and intent of the law would seem to be to require a certain amount of labor to be performed before the end of a certain period next succeeding the date of location.

Commissioner Williamson at first accepted this construction of the law,[64] but subsequently announced a different view; not, it is true, in a contested case, but in the form of a letter, wherein he states that a claim located on October 1, 1879, requires the expenditure of one hundred dollars' worth of labor or improvements thereon within the calendar year 1880, and that whatever may have been expended during the year 1879 will not answer the requirements of expenditures in 1880.[65] The effect of this rule, if maintained, will, in states requiring preliminary development work as an act of location, deny the locator any credit for

62 Discovery shaft or its equivalent. *Ante*, § 344.

63 Talbott v. King, 6 Mont. 76, 9 Pac. 434, 440.

64 In re Hale, 7 Copp's L. O. 115.

65 In re Haynes, 7 Copp's L. O. 130.

such preliminary work, unless his discovery fortuitously occurs in the latter part of a year and he is enabled to delay such work until after January 1st. If the date of discovery is not, by relation, to be considered as the date of the *location,* then, as a matter of course, the preliminary work cannot be estimated in any event.

If the views last expressed by Commissioner Williamson are recognized by the land department,—and informal letters of the land officers frequently ripen into formal rules,—the locator's only safe course is to follow them without waiting for the courts to pass upon the question.

Of one thing we are quite sure: No matter how extensive a development or how large an expenditure may be made during any one calendar year, the excess over one hundred dollars cannot be carried forward and credited on the next year.[66] The obligation to perform the statutory amount each year is not satisfied by doing two or more years' work in one.

The mere pendency of patent proceedings does not, prior to the issuance of a certificate of purchase, excuse the performance of annual labor.[67]

On the question of the pendency of an action instituted in the courts to determine an adverse claim dispensing with the necessity of performing the annual labor, the land department has not always been consistent in its rulings. For example, they have at times held that the work must be done, notwithstanding the title was being litigated in the courts.[68]

[66] In re Merrell, 5 Copp's L. O. 5.

[67] Gillis v. Downey, 85 Fed. 483, 489, 29 C. C. A. 286; South End M. Co. v. Twiney, 22 Nev. 19, 35 Pac. 89, 91; Hughes v. Ochsner, 27 L. D. 396; Ferguson v. Belvoir Mill Co., 14 L. D. 43; Cain v. Addenda M. Co., 29 L. D. 62; McNeil v. Pace, 3 L. D. 267.

[68] Continental G. & S. M. Co., 10 L. D. 534; Clark v. American

The entry of judgment in the adverse suit would not excuse its performance.[69] The department has even gone so far as to assert that if after filing an application for a patent and prior to entry the applicant neglects to perform the necessary work, the department may cancel the application; or if an entry has been made after protest filed, alleging failure to perform the work, the entry may be canceled.[70] The most recent views of that tribunal, however, modify the foregoing statements in several important particulars.[71]

While recognizing its right to cancel or dismiss a patent application which is suffered to lie dormant for an unreasonable length of time, or not prosecuted with reasonable diligence,[72] it has enunciated the doctrine that the question of performance or nonperformance of annual labor is one confined to adverse claimants, to be determined by the courts, and that the department is not concerned therewith.[73]

It has further said that an applicant for patent who has been adversed in the courts is not obliged after the commencement of the adverse proceedings to keep up the annual work,[74] and the department has taken

Flag G. M. Co., 7 Copp's L. O. 5; Higgins v. John G. M. Co., 14 Copp's L. O. 238.

69 Reins v. Montana C. Co., 29 L. D. 461.

70 Sweeney v. Wilson, 10 L. D. 157.

71 See § 731, *post*, for the attitude of the department toward relocations pending patent proceedings.

72 *Post*, § 696.

73 Barklage v. Russell, 29 L. D. 401, 402; In re Wolenberg, 29 L. D. 302, 304; Marburg Lode Mining Claim, 30 L. D. 202, 206; Gaffney v. Turner, 29 L. D. 470, 474; Cleveland v. Eureka No. 1 G. M. Co., 31 L. D. 69, 71; Copper Bullion etc. Claim, 35 L. D. 27.

74 Marburg Lode Mining Claim, 30 L. D. 202, 211; Lucky Find Placer, 32 L. D. 200. But, in order to excuse the performance of annual labor, the adverse suit must be an active one, such as the statute contemplates, and brought to determine the right of possession, and

the same view where the interposition of a protest has prevented the applicant from making entry.[75]

This view of the law is, we deferentially suggest, in direct conflict with the terms of the statute, which requires the work to be done annually until a patent has been issued,[76] and the supreme court of Montana[77] has held that a pending protest or adverse claim does not excuse the performance of annual labor, which must be done up to the date of actual cash payment and entry.[78]

There may be some ethical reasons preventing an adverse claimant who is prosecuting his claim in the courts from relocating a claim on the ground of the failure of the patent applicant to perform the work, but such reasons would not apply to a stranger to the controversy, and in the absence of performance of work by one or the other of the litigating parties, third parties could certainly relocate and assert their rights in the courts.[79]

§ 633. **By whom labor must be performed.**—Manifestly, the mine must be represented and the annual work performed by, or at the instance of, the owner or someone in privity with him. Work done by a mere trespasser or stranger to the title not in privity with the owner[80] will not inure to the benefit of the locator,[81]

not a dead suit which the defendant applicant has power to dismiss at any time. Ring v. Montana Loan & Realty Co., 33 L. D. 132.

[75] Marburg Lode M. C., 30 L. D. 202, 211; Lucky Find Placer, 32 L. D. 200; Ring v. Montana Loan & Realty Co., 33 L. D. 132.

[76] Rev. Stats., § 2324.

[77] Poore v. Kaufman, 44 Mont. 248, 119 Pac. 785, 786.

[78] See, also, Morrison's Mining Rights, 14th ed., pp. 571, 572, and Costigan on Mining Law, pp. 286, 287.

[79] *Post*, § 731; Poore v. Kaufman, 44 Mont. 248, 119 Pac. 785, 786.

[80] In re McCornick, 40 L. D. 498.

[81] Little Gunnell M. Co. v. Kimber, 1 Morr. Min. Rep. 536, Fed.

although ultimately paid for by the claimant; but work done for the benefit of the claim by one holding the equitable title will operate to preserve the claim from forfeiture and inure to the benefit of the claim.[82]

It is the duty of a party in possession under a contract of purchase to do the work in order to preserve the vendor's right to the property.[83]

The death of the owner will not excuse the performance of work, and the duty falls upon the heirs or personal representatives to perform the work.[84]

Compliance with the law by a mineral claimant, who is at such time holding under color of title, will accrue to his benefit on the acquirement of the legal title.[85]

The purchaser of a claim from a prior locator is entitled to the benefit of all expenditures made by his grantor in the development thereof,[86] but such work cannot be utilized for the purpose of expanding the claim,—e. g., increasing it from twenty to fortty acres in the case of placer locations.[87]

A stockholder in a corporation which owns a mining claim can perform the work and prevent a forfeiture even if he performed the work with the idea of securing some personal advantage, for he has sufficient in-

Cas. No. 8402; Nesbitt v. De Lamar's Nevada G. M. Co., 24 Nev. 273, 77 Am. St. Rep. 807, 52 Pac. 609, 610, 53 Pac. 178, 179, 19 Morr. Min. Rep. 286.

82 Book v. Justice M. Co., 58 Fed. 106, 119, 17 Morr. Min. Rep. 617; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 11 Fed. 666, 682, 4 Morr. Min. Rep. 411; Nesbitt v. De Lamar's Nevada G. M. Co., 24 Nev. 273, 77 Am. St. Rep. 807, 52 Pac. 609, 610, 53 Pac. 178, 19 Morr. Min. Rep. 286; Anderson v. Caughey, 3 Cal. App. 22, 84 Pac. 223, 224.

83 Godfrey v. Faust, 18 S. D. 567, 101 N. W. 718, 719.

84 Elder v. Horseshoe M. & M. Co., 194 U. S. 248, 256, 24 Sup. Ct. Rep. 643, 48 L. ed. 960.

85 Dolles v. Hamberg Cons. M. Co., 23 L. D. 267.

86 Tam v. Story, 21 L. D. 440.

87 In re Head, 40 L. D. 135.

terest in the preservation of the corporation title to justify the crediting of such work for the benefit of the corporation.[88]

§ 634. Circumstances under which performance of annual labor is excused.—During certain periods of industrial depression congress has passed special laws suspending the provisions of the section of the Revised Statutes requiring the performance of annual labor,[89] upon the condition, that the claimant[90] file with the recorder of mining locations in the locality in which his claim was situated a declaration of intention to hold and work the claim in good faith;[91] but these are mere transitory acts which have fully accomplished the object for which they were passed, and no longer require consideration. The existence of Indian hostilities in the border regions,—a not infrequent occurrence in the past,—where an attempt to comply with the law as to annual labor would jeopardize the life of the locator, would certainly excuse the strict fulfillment of

88 Wailes v. Davies, 158 Fed. 667, 672; affirmed, 164 Fed. 397, 90 C. C. A. 385.

89 Act of Nov. 3, 1893, 28 Stats. at Large, p. 6; Act of July 18, 1894, Id., 114; Act of July 2, 1898, 30 Stats. at Large, p. 651; Comp. Stats. 1901, p. 1428, 5 Fed. Stats. Ann. 21 (excusing owners of claims who enlist in military or naval service of United States for duty in the war with Spain from performance of annual labor). The effect of compliance with this act is discussed in Field v. Tanner, 32 Colo. 278, 75 Pac. 916, 918.

90 "Claimant" includes one who, claiming in good faith to be the owner, although not such in law, files the notice for the benefit of himself and his co-owners. Nesbitt v. De Lamar's Nevada G. M. Co., 24 Nev. 273, 77 Am. St. Rep. 807, 52 Pac. 609, 610, 53 Pac. 178, 19 Morr. Min. Rep. 286.

91 Compliance with the terms of these acts is equivalent to performing the labor for that year, and saves the claim from liability of forfeiture, although there has been a failure to perform the work during the previous year. Field v. Tanner, 32 Colo. 278, 75 Pac. 916, 918.

the requirements of the law, provided, of course, that the locator returns within a reasonable time after the cessation of such hostilities, and resumes his efforts to represent his claim. This is but the application in a larger sense of the rule which excuses the performance of work when the claim is in the hostile possession of another, rendering it impossible to comply with law without incurring risk of injury to life or limb, or committing or inviting a breach of the peace.

A person in the peaceful and lawful occupancy of public land, for the purpose of initiating a title, having established his right so far as he could or was permitted, acquires a title which entitles him to the possession of the land as against all persons except the government. When he is forcibly prevented from fulfilling the letter of the law, it will be presumed that he would have fulfilled it if permitted so to do.[92]

So it has been decided that where adverse possession of a mining claim is taken and held wrongfully, the rightful owner or locator is excused from doing the assessment work during the continuance of such adverse holding.[93]

It has been held that when an action has been brought to determine the right of possession, an injunction will lie against interference with either party in the performance by the other of acts necessary to perfect or preserve a location.[94]

[92] Robinson v. Imperial S. M. Co., 5 Nev. 44, 10 Morr. Min. Rep. 370; Alford v. Dewin, 1 Nev. 207.

[93] Utah M. & Mfg. Co. v. Dickert M. S. Co., 6 Utah, 183, 21 Pac. 1002, 1010, 5 L. R. A. 259; Mills v. Fletcher, 100 Cal. 142, 34 Pac. 637, 639; Trevaskis v. Peard, 111 Cal. 599, 44 Pac. 246, 247; Erhardt v. Boaro, 8 Fed. 692, 2 McCrary, 14, 4 Morr. Min. Rep. 432; Lockhart v. Wills, 9 N. M. 263, 50 Pac. 318, 320; Id., 9 N. M. 344, 54 Pac. 336, 342, 19 Morr. Min. Rep. 497; Field v. Tanner, 32 Colo. 278, 75 Pac. 916; Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176.

[94] Safford v. Fleming, 13 Idaho, 271, 89 Pac. 827, 828.

A locator cannot be deprived of his inchoate rights by the tortious acts of others,[95] but there must be a *bona fide* effort to perform the work. The acts and hostile declarations of one asserting an adverse right must be of so serious and menacing a character as to satisfy a man of ordinary prudence that it would be unsafe to begin work. Threats made at long range, when a relocator is not in the physical possession of the claim, or if made upon the claim, are of such a negative character as to preclude the idea that an attempted resumption of work would be met with force, will not excuse a reasonable attempt to comply with the law.[96]

It may be suggested that third parties disconnected with either the original locator or the hostile relocator might effect a relocation, which would defeat the title of both contending parties. The answer to this is found in the fact that no one could initiate a right by force and violence;[97] and if the *status* of the claim as to physical occupancy is such as to admit of its peaceable relocation by outsiders, it is open to a peaceful re-entry by the original locator for the purpose of performing his labor.[98]

[95] Erhardt v. Boaro, 113 U. S. 527, 534, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472; Lockhardt v. Wills, 9 N. M. 263, 50 Pac. 318, 319; Lockhart v. Wills, 9 N. M. 344, 54 Pac. 336, 342, 19 Morr. Min. Rep. 497; Garvey v. Elder, 21 S. D. 77, 130 Am. St. Rep. 704, 109 N. W. 508, 509.

[96] Slavonian M. Co. v. Vacavich, 7 Saw. 217, 7 Fed. 331, 335, 1 Morr. Min. Rep. 541. The supreme court of South Dakota seems to dissent from this view and says: "There may be decisions which seem to hold that the prior locator in this class of cases should persist in his efforts to perform the required labor until prevented by the apprehension of imminent physical violence. If so, we respectfully decline to follow them, believing they do not rest upon sound principles, and are calculated to engender unnecessary resorts to physical force." Garvey v. Elder, 21 S. D. 77, 130 Am. St. Rep. 704, 109 N. W. 508, 509.

[97] *Ante*, § 217. See, also, *post*, § 688.

[98] It has been claimed that when a mining location has been pos-

§ 635. Value of labor and improvements—How estimated.—In some of the mining districts attempts have been made to fix the value of a day's labor, and in Nevada[99] we encounter a statute prescribing the number of hours which shall constitute a day's work upon a mining claim, and providing that such day's work shall be of the value of four dollars. This class of legislation contravenes the federal law.[100]

The following instruction upon the method of determining values has been approved by the supreme court of Montana:—

> In determining the amount of work done upon a claim, or improvements placed thereon for the purpose of representation, the test is as to the reasonable value of the said work or improvements—not what was paid for it or what the contract price was, but it depends entirely upon whether or not the said work or improvements were reasonably worth the said sum of one hundred dollars.[1]

sessed and worked for the period required by the statute of limitations, that the provisions of section 2332, Revised Statutes (Comp. Stats. 1901, p. 1433; 5 Fed. Stats. Ann. 44), do not require the further performance of annual labor, and the claim would not be open to forfeiture for such failure to do the work. The supreme court of New Mexico, after an exhaustive review of the authorities, holds that possession for the statutory period merely dispenses with the formal location and does not excuse the performance of annual labor. Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 282.

99 Comp. Laws 1900, § 216; Rev. Laws 1912, § 2430.

100 Penn v. Oldhauber, 24 Mont. 287, 61 Pac. 649, 650; Woody v. Barnard, 69 Ark. 579, 65 S. W. 100, 101.

1 Mattingly v. Lewisohn, 13 Mont. 508, 520, 35 Pac. 111, 114; reaffirmed, Penn v. Oldhauber, 24 Mont. 287, 61 Pac. 649, 650; Stolp v. Treasury G. M. Co., 38 Wash. 619, 80 Pac. 817, 818; Walton v. Wild Goose M. & T. Co., 123 Fed. 208, 218, 60 C. C. A. 155, 22 Morr. Min. Rep. 688, charge to jury; McCulloch v. Murphy, 125 Fed. 147, 149; Whalen Cons. Copper Co. v. Whalen, 127 Fed. 611, 612.

A mere expenditure is not of itself sufficient.[2] The work must tend to develop the claim and be of the reasonable value claimed.[3]

Cost is an element in establishing value,[4] and while not conclusive, strongly tends to establish the good faith of the claimant.[5]

It is not material whether the labor performed is paid for or not, provided it is done at the instigation of the owner.[6] The fulfillment of the provision of the law lies in the performance of the labor or the making of the improvements required,[7] and not in the payment for it. Owners of mining claims are sometimes imposed upon by those who are paid for doing the work, but the obligation rests on the owner to see that the work is actually done.[8]

In estimating the value of the labor performed the jury should consider the distance of the mine from the nearest point where labor could be procured, the cost of maintaining men while the labor was being performed, the current rate of wages, and any other neces-

[2] McCulloch v. Murphy, 125 Fed. 147, 149.

[3] Floyd v. Montgomery, 26 L. D. 122, 132; In re Beatty, 40 L. D. 486.

[4] McCormick v. Parriott, 33 Colo. 282, 80 Pac. 1044, 1045.

[5] Id.; McCulloch v. Murphy, 125 Fed. 147, 149; Whalen Cons. Copper Co. v. Whalen, 127 Fed. 611, 613; Willitt v. Baker, 133 Fed. 937, 948; In re Beatty, 40 L. D. 486.

[6] Lockhardt v. Rollins, 2 Idaho, 503, 540, 21 Pac. 413, 416, 16 Morr. Min. Rep. 16; Big Three M. & M. Co. v. Hamilton, 157 Cal. 130, 137 Am. St. Rep. 118, 107 Pac. 301, 305.

[7] Coleman v. Curtis, 12 Mont. 301, 30 Pac. 266, 268; Anderson v. Caughey, 3 Cal. App. 22, 84 Pac. 223, 224.

[8] Wagner v. Dorris, 43 Or. 392, 73 Pac. 318, 321; Protection Min. Co. v. Forest City M. Co., 51 Wash. 643, 99 Pac. 1033, 1034.

sary and reasonable expense which might be incurred in the performance of the said labor.[9]

Experience teaches us that this question of value of annual labor forms the basis of innumerable controversies. Every relocator is interested in depreciating the value of work performed by the original locator, and the latter in saving his claim from forfeiture is interested in extolling its worth.[10] It is largely a question of opinion, upon which both practical miners and experts will disagree. As was observed by the supreme court of Colorado,—

> It is probable that testimony could be obtained to show that nearly all the annual assessment work done upon mining claims was of less value than the law required, excepting those instances where it greatly exceeds the sum of one hundred dollars; and while the amount paid is not conclusive that work of that value has been done, but the actual value is the true test whether or not the law has been complied with, yet, where the testimony is conflicting as to the value, it is proper to consider whether there has been a *bona fide* attempt to comply with the law.[11]

§ 636. Proof of annual labor under state laws.— Most of the states and territories subject to the congressional mining laws have enacted statutes providing for proof, in the form of affidavits establishing the fact

[9] Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 218, 60 C. C. A. 155, 22 Morr. Min. Rep. 688, charge to jury.

[10] McCulloch v. Murphy, 125 Fed. 147, 150; Willitt v. Baker, 133 Fed. 937, 948.

[11] Quimby v. Boyd, 8 Colo. 194, 208, 6 Pac. 462, 471. See, also, Wright v. Killian, 132 Cal. 56, 64 Pac. 98, 100; Bakke v. Latimer, 3 Alaska, 95, 98. Of course a mere attempt in good faith to perform labor will not avail unless the work is actually performed. McKay v. Neussler, 148 Fed. 86, 87, 78 C. C. A. 154.

that the annual labor for a given year has been performed. Such affidavits are required to contain a statement as to the nature and value of the work performed and improvements made, and are to be filed before the end of a given period with the recording officer in whose office record of mining locations is made pursuant to local or state legislation. This class of legislation is found in California,[12] Colorado,[13] Idaho,[14] Montana,[15] Nevada,[16] New Mexico,[17] Utah,[18] Washington,[19] Wyoming,[20] Arizona,[21] and Arkansas,[22] and has been provided by the federal government for Alaska.[23]

The full text of state legislation on this subject will be found under appropriate heads in the Appendix. It is unnecessary to consider here anything beyond the general object of this class of state laws.

The failure to file affidavits of annual labor is accompanied by no serious penalty. There is no provision

12 Civ. Code, § 1426m.

13 Mills' Ann. Stats., § 3161, as amended—Session Laws of 1889, p. 261; Rev. Stats. 1908, § 4209.

14 Laws 1895, p. 27; Civ. Code 1901, § 2565; Rev. Code 1907, § 3211.

15 Rev. Code 1895, § 3614. This section was omitted from the Revised Codes of 1907, but the attorney-general of Montana states that it is still in effect.

16 Comp. Laws 1900, § 217; Rev. Laws 1912, § 2431.

17 Act of March 18, 1897; Comp. Laws 1897, § 2315.

18 Laws 1899, p. 26, § 6; Comp. Stats. 1907, § 1500.

19 Laws 1899, p. 70, § 6; Rem. & Bal. Codes 1909, § 7363. Placers, Id., p. 72, § 10 (4), as amended—Laws 1901, p. 292; Rem. & Bal. Codes 1909, § 7368.

20 Rev. Stats. 1899, § 2559, as amended—Laws 1901, p. 105, § 3; Comp. Stats. 1910, § 3479.

21 Rev. Stats. 1901, § 3240.

22 Acts of 1901, p. 330, § 2; Digest of Stats. 1904, § 5364.

23 34 Stats. at Large, § 1243; Comp. Stats. (Supp. 1911), p. 609; Fed. Stats. Ann. (Supp. 1909), p. 25.

in any of the existing statutes to the effect that a failure to comply with its terms will work a forfeiture.[24]

If any such conditions were inserted, or if any of the laws in question were susceptible of any such construction, they would undoubtedly be considered as unreasonable, and repugnant to the federal law. A forfeiture of a mining claim cannot be established, except upon clear and convincing proof of the failure of the locators or owners of the claim to have the work done or improvements made to the amount required by law.[25] All these statutes provide that the affidavits when filed, or certified copies of them, shall be *prima facie* evidence of the facts therein stated, which, of course, means such facts as are required by the law to be stated therein. Such affidavits, although *ex parte,* are admissible in evidence.[26] A mistake in the name of the owner at whose expense the annual work was done will not vitiate the affidavit if the work was actually done for the real owner, and evidence of this fact would be admissible.[27]

In Idaho it is provided that the failure to file such an affidavit shall be considered *prima facie* evidence that the requisite labor has not been performed, and likewise in New Mexico such failure places the burden of proof upon the owner or owners of such claim to

[24] Book v. Justice M. Co., 58 Fed. 106, 118, 17 Morr. Min. Rep. 617; Murray Hill M. & M. Co. v. Havenor, 24 Utah, 73, 66 Pac. 762.

[25] Book v. Justice M. Co., 58 Fed. 106, 118, 17 Morr. Min. Rep. 617; Hammer v. Garfield M. & M. Co., 130 U. S. 291, 301, 9 Sup. Ct. Rep. 548, 32 L. ed. 964, 16 Morr. Min. Rep. 125; Strasburger v. Beecher, 20 Mont. 143, 49 Pac. 740, 742; Providence G. M. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641, 644, 19 Morr. Min. Rep. 625; *post,* § 645.

[26] Big Three M. & M. Co. v. Hamilton, 157 Cal. 130, 137 Am. St. Rep. 118, 107 Pac. 301.

[27] Bismarck Gold M. Co. v. North Sunbeam Gold M. Co., 14 Idaho, 516, 95 Pac. 14, 19.

show that such work has been done according to law.[28] Ordinarily the burden of proof rests with the party charging a forfeiture to show that the work has not been performed by the previous locator.[29]

In Idaho and New Mexico, where there is a failure to file the proof of annual labor, or where it is not filed in time or the affidavit is defective, this rule is modified and the burden is shifted.[30] We cannot see any objection to this class of state legislation. The several states have a right to define the nature, degree, and effect of evidence, within rational limits, and we do not think these provisions unreasonable.

The general purpose and object of state laws authorizing the making and filing of proofs of annual labor are fully stated by Judge Hawley in Book v. Justice Mining Co., in construing the Nevada statute:—

> The object of this act was evidently to fix some definite way in which the proof as to the performance of the work or expenses incurred in the making of improvements might be in many cases more accessible. In all mining communities there is liable to be some difficulty in finding the men who actually performed the labor or made the improvements and procuring their testimony, in order to establish the facts necessary to show a compliance with the mining law in this respect. . . . . Locators of mining claims would doubtless often save much time and trouble, as well as hardship, inconvenience, and expense, by complying with the provisions of the act; but the act does

[28] McKnight v. El Paso Brick Co., 16 N. M. 721, 120 Pac. 694, 700.

[29] Hammer v. Garfield M. & M. Co., 130 U. S. 291, 301, 9 Sup. Ct. Rep. 548, 32 L. ed. 964, 16 Morr. Min. Rep. 125; Johnson v. Young, 18 Colo. 625, 34 Pac. 173; Quigley v. Gillett, 101 Cal. 462, 35 Pac. 1040, 1042, 18 Morr. Min. Rep. 68; Coleman v. Curtis, 12 Mont. 301, 30 Pac. 266; Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708, 709; Strasburger v. Beecher, 20 Mont. 143, 49 Pac. 740, 741.

[30] McKnight v. El Paso Brick Co., 16 N. M. 721, 120 Pac. 694, 700; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 283.

not prevent, and was not intended to prohibit, the owners of a mining claim from making the necessary proof in any other manner, nor does it prohibit the contesting party from contradicting the facts stated in the affidavit.[31]

As was said by the supreme court of Montana,—

> The statute provides a convenient method of preserving *prima facie* evidence of the annual representation of mining claims, by the performance of the labor or making of the improvements of the value required thereon, by putting such evidence in the form of an affidavit, stating the facts required. This statute relates not to the effect of doing the work or making the improvements as required by law, but to the method of preserving *prima facie* evidence of the fact that such requirement has been fulfilled.[32]

The affidavit may be filed at any time after the work has been performed, and prior to the lapse of the period fixed by the statute,[33] but if filed after the period prescribed has elapsed, it is ineffectual.[34] No penalty is attached to the failure to file such an affidavit, however, and there is no provision in any of the existing statutes bearing upon this subject which declares that such failure will work a forfeiture of the claim.[35]

There is no requirement in any of these laws that there should be a separate affidavit for each claim represented;[36] but in cases of groups represented by work done within the limits of one of the claims comprising it, or where it is asserted that work done outside of a

31 58 Fed. 106, 118, 17 Morr. Min. Rep. 617.

32 Coleman v. Curtis, 12 Mont. 301, 305, 30 Pac. 266, 267; Davidson v. Bordeaux, 15 Mont. 245, 250, 38 Pac. 1075, 1076.

33 McGinnis v. Egbert, 8 Colo. 41, 48, 5 Pac. 652, 655, 15 Morr. Min. Rep. 329.

34 McKnight v. El Paso Brick Co., 16 N. M. 721, 120 Pac. 694, 700.

35 McCulloch v. Murphy, 125 Fed. 147, 150.

36 Id.

claim or group of claims was so performed for the benefit of such claim or group, the affidavit to possess any value or force should clearly demonstrate that the work so done related directly to the claims, and that such work obviously tended to their development. A mere conclusion of the affiant to that effect would not be accepted.

§ 637. Obligation to perform labor annually ceases with the final entry at the land office.—The law requires that labor shall be performed or improvements made upon each claim until a patent has been issued therefor.

> The true rule of law governing entries of public land, to which mineral lands form no exception, is, that when the contract of purchase is completed by the payment of the purchase money and the issuance of the patent certificate by the authorized agents of the government, the purchaser at once acquires a vested interest in the land, of which he cannot be subsequently deprived if he has complied with the requirements of the law prior to entry, and the land thereupon ceases to be a part of the public domain, and is no longer subject to the operation of the laws governing the disposition of the public lands. In such cases there is part performance of a contract of sale, which entitles the purchaser to a specific performance of the whole contract without further action on his part. When the proofs are made and the purchase money paid, the equitable title of the purchaser is complete, and the patent when issued is evidence of the regularity of the previous acts, and relates to the date of the entry to the exclusion of all intervening claims. In short, an entry made is in all respects equivalent to a patent issued, in so far as third parties are concerned.[37]

[37] Secretary Schurz, In re American Hill Q. M., 3 Sickle's Min. Dec. 377; S. C., Commrs. Decision, Id. 384. See, also, Gold Blossom Q. M., 2 L. D. 767; American Hill Q. M., 5 Copp's L. O. 114; Id., 6 Copp's

This view was accepted by the courts as a proper interpretation of the law,[38] and the supreme court of the United States quoted approvingly the ruling of the land department, and held that when the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the land department causes delay; but such delay in the mere administration of affairs does not diminish the rights flowing from the purchase, or cast any additional burdens upon the purchaser, or expose him to the assaults of third parties.[39] The obligation to perform the annual labor ceases, therefore, when final entry and payment is made and the certificate of purchase is issued, *provided* the issuance of such certificate is not procured through fraud.[40] This obligation, however, may be revived by either a cancellation or suspension of the entry, but this cancellation cannot be given retroactive effect to the detriment of the entryman.[41]

L. O. 1; David Foote Lode, 26 L. D. 196; Reins v. Montana Copper Co., 29 L. D. 461, 464; Nielson v. Champagne M. & M. Co., 29 L. D. 491; McCormick v. Night Hawk, 29 L. D. 373; Marburg Lode Mining Claim, 30 L. D. 202; Lucky Find Placer, 32 L. D. 200.

[38] Aurora Hill Cons. M. Co. v. 85 M. Co., 34 Fed. 515, 518, 12 Saw. 355, 15 Morr. Min. Rep. 581; Deno v. Griffin, 20 Nev. 249, 20 Pac. 308, 309; Alta M. & S. Co. v. Benson M. & S. Co., 2 Ariz. 362, 16 Pac. 565, 568; Crane's Gulch M. Co. v. Scherrer, 134 Cal. 350, 86 Am. St. Rep. 279, 66 Pac. 487, 488, 21 Morr. Min. Rep. 549; Southern Cross G. M. Co. v. Sexton, 147 Cal. 758, 82 Pac. 423; *post*, § 771.

[39] Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428, 432, 12 Sup. Ct. Rep. 877, 36 L. ed. 762, 17 Morr. Min. Rep. 488. See, also, Deffeback v. Hawke, 115 U. S. 392, 405, 6 Sup. Ct. Rep. 95, 29 L. ed. 423; Southern Cross G. M. Co. v. Sexton, 147 Cal. 758, 82 Pac. 423; Batterton v. Douglas M. Co., 20 Idaho, 760, 120 Pac. 827.

[40] Murray v. Polglase, 23 Mont. 401, 59 Pac. 439, 441.

[41] Southern Cross G. M. Co. v. Sexton, 147 Cal. 758, 82 Pac. 423, 424. For comment on this case, see Juno et al. Lode Claims, 37 L. D. 365, and for discussion of time when such cancellation becomes effective, see *post*, § 772.

The commissioner of the general land office has power to suspend the entry on which the certificate is founded, by virtue of his supervisory control over the acts of his subordinates,[42] and when suspended the certificate of purchase cannot be used as evidence so long as the suspension continues.[43] He has also the power to cancel the certificate upon due notice and under proper conditions;[44] but so long as the certificate remains uncanceled or unsuspended the annual labor need not be performed.

The department has held that annual labor need not be performed even prior to entry and pending patent proceedings where an adverse claim or protest has been interposed which prevents the applicant from completing his entry,[45] but as we have heretofore observed, the correctness of this ruling is extremely dubious in view of the express terms of the statute.[46]

§ 638. **Millsites.**—Millsites are not subject to the annual labor law. Their use and occupancy for purposes connected with mining operations on the lodes to which they are extralimital adjuncts is all that is required. This is the rule followed by the land department in relation to the expenditures required for patent purposes.[47]

[42] Hosmer v. Wallace, 47 Cal. 461. A full discussion of the powers and duties of the land department will be found in the next title.

[43] Figg v. Hensley, 52 Cal. 299; Murray v. Polglase, 17 Mont. 455, 43 Pac. 505, 507.

[44] Caldwell v. Bush, 6 Wyo. 342, 45 Pac. 488, 489; Parsons v. Venzke, 164 U. S. 89, 92, 17 Sup. Ct. Rep. 27, 41 L. ed. 360.

[45] Marburg Lode, 30 L. D. 202, 211; Lucky Find Placer, 32 L. D. 200; Ring v. Montana Loan & Realty Co., 33 L. D. 132.

[46] Poore v. Kaufman, 44 Mont. 248, 119 Pac. 785, 787; and see, also, Morrison's Mining Rights, 14th ed., pp. 571, 572, and Costigan on Mining Law, pp. 286, 287.

[47] Commrs. Letter, 1 Copp's L. O. 2; Alta Millsite, 8 L. D. 195. See *ante*, §§ 519–524.

It is difficult to see how a millsite can be *developed.* It is not a mining claim. It must be located on non-mineral land, and its continued existence depends entirely upon its use in connection with a located vein. We, of course, have no reference to millsites upon which are erected custom-mills or reduction-works under the last clause of section twenty-three hundred and thirty-seven of the Revised Statutes.

It is unnecessary to add anything to that which we have heretofore said on the subject of millsites.

CHAPTER VI.

FORFEITURE OF THE ESTATE, AND ITS PREVENTION BY RESUMPTION OF WORK.

ARTICLE I. ABANDONMENT AND FORFEITURE.
II. RESUMPTION OF WORK.

ARTICLE I. ABANDONMENT AND FORFEITURE.

§ 642. Circumstances under which the locator's estate is terminated.
§ 643. Distinction between abandonment and forfeiture.
§ 644. Acts constituting abandonment—Evidence establishing or negativing it.
§ 645. Forfeiture.
§ 645a. Effect of abandonment of forfeiture by senior upon rights of junior conflicting locator as to conflict area.
§ 646. Forfeiture to co-owners.

§ 642. Circumstances under which the locator's estate is terminated.—In the case of Black v. Elkhorn Mining Co., decided by the supreme court of the United States upon the subject of dower in unpatented mining claims, we find the following statement as to the nature of a locator's title and the circumstances under which it may be extinguished:—

> To sum up: As to the character of the right which is granted by the United States to a locator, we find,—
>
> (1) That no written instrument is necessary to create it. Locating upon the land and continuing yearly to do the work provided for by the statute gives to and continues in the locator the right of possession as stated in the statute.
>
> (2) This right, conditional in its character, may be forfeited by the failure of the locator to do the necessary amount of work; or if, being one among several locators, he neglects to pay his share for the work

which has been done by his co-owners, his right and interest in the claim may be forfeited to such co-owners under the provisions of the statute.

(3) His interest in the claim may also be forfeited by his abandonment, with an intention to renounce his right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had.[1]

In support of the last proposition the court says:—

> An easement in real estate may be abandoned without any writing to that effect, and by any act evincing an intention to give up and renounce the same. If the locator remained in possession and failed to do the work provided for by the statute, his interest would terminate under such circumstances. If he convey to another a right which may be thus lost, that conveyance would seem to be equivalent to an abandonment by him of all rights under the statute. What could be better evidence of an intention to abandon than an actual conveyance of his right to another, ceasing to do any work thereon, and giving up of his possession in accordance with his conveyance? The abandonment by simply leaving the land is no more efficacious than conveying his rights and also leaving possession without any intention of returning.

This characterization of the nature of the estate in a perfected mining location does not, at the first glance, seem to blend harmoniously with other declarations of the same tribunal. For example, that court has said:—

1 Black v. Elkhorn M. Co., 163 U. S. 445, 450, 16 Sup. Ct. Rep. 1101, 41 L. ed. 221, 18 Morr. Min. Rep. 375; cited and doctrine restated, Farrell v. Lockhart, 210 U. S. 142, 147, 28 Sup. Ct. Rep. 681, 52 L. ed. 994, 16 L. R. A., N. S., 162; Swanson v. Kettle, 17 Idaho, 321, 105 Pac. 1059, 1063.

A mining claim perfected under the law is property in the highest sense of the term[2]—in the fullest sense of the word.[3]

A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located.[4]

If the decision in Black v. Elkhorn Mining Company had been promulgated by any court of less dignity than the supreme court of the United States, we might deferentially suggest that while the view announced upon the subject of abandonment, as distinguished from forfeiture, was undoubtedly applicable to the early mining tenures as they existed prior to the enactment of the federal mining laws, by legislative construction and judicial interpretation the character of the estate in later years had been raised to such a dignity that it required something more than a mere parol abandonment to terminate it.

In Bradford v. Morrison[5] the supreme court of the United States explains its decision in Black v. Elkhorn M. Co. and disclaims any intention to detract from the dignity of the miner's estate as defined in its earlier decisions. It is also worthy of note that in stating in the Bradford-Morrison case how such an

[2] Forbes v. Gracey, 94 U. S. 762, 24 L. ed. 313, 14 Morr. Min. Rep. 183; Belk v. Meagher, 104 U. S. 279, 283, 26 L. ed. 735, 1 Morr. Min. Rep. 510.

[3] Manuel v. Wulff, 152 U. S. 505, 510, 14 Sup. Ct. Rep. 651, 38 L. ed. 532, 18 Morr. Min. Rep. 85.

[4] Gwillim v. Donnellan, 115 U. S. 45, 49, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15 Morr. Min. Rep. 482; McKinley Creek M. and M. Co. v. Alaska United M. Co., 183 U. S. 563, 571, 22 Sup. Ct. Rep. 84, 46 L. ed. 331, 21 Morr. Min. Rep. 730.

[5] 212 U. S. 389, 396, 29 Sup. Ct. Rep. 349, 53 L. ed. 564.

estate may be lost the court says nothing about abandonment. The language of the court is significant:—

> Of course [said the court] if the conditions subsequent as the doing of the necessary work were not performed the title would be subject to forfeiture.

While it is true that no written instrument creating the grant is signed by the grantor, yet in at least thirteen out of the fourteen states and territories subject to the federal mining laws, with the consent and under the sanction of the federal government, a record title is established. "A statutory writing affecting realty, being in part the basis of a miner's title,"[6] is required.

While as between the government and the locator the title of the latter is equitable, the courts of the mining states have uniformly held that as against everyone else the estate was that of a freehold.

The supreme court of the United States has said that a written conveyance is not necessary to the transfer of a mining claim,[7] citing, as authority for this doctrine, an early California case;[8] but ever since 1860 the supreme court of that state has, by a uniform line of decisions, held that a written instrument was necessary to pass the title to a located mine.[9] The same rule obtains in Montana,[10] and we think we are justi-

[6] Pollard v. Shively, 5 Colo. 309, 312, 2 Morr. Min. Rep. 229.

[7] Union Cons. S. M. Co. v. Taylor, 100 U. S. 39, 42, 25 L. ed. 541, 5 Morr. Min. Rep. 323.

[8] Table Mt. T. Co. v. Stranahan, 20 Cal. 198, 9 Morr. Min. Rep. 457.

[9] Goller v. Fett, 30 Cal. 481, 484, 11 Morr. Min. Rep. 171; Felger v. Coward, 35 Cal. 650, 652, 5 Morr. Min. Rep. 27; Hardenbergh v. Bacon, 33 Cal. 356, 381, 1 Morr. Min. Rep. 352; Melton v. Lambard, 51 Cal. 258, 260, 14 Morr. Min. Rep. 695; Garthe v. Hart, 73 Cal. 541, 544, 15 Pac. 93, 15 Morr. Min. Rep. 492; Moore v. Hamerstag, 109 Cal. 122, 41 Pac. 805, 806, 18 Morr. Min. Rep. 256.

[10] Hopkins v. Noyes, 4 Mont. 550, 2 Pac. 280, 281, 15 Morr. Min. Rep. 287.

fied in making the statement, that at the present time, in every state and territory subject to the federal mining laws, a perfected mining location is treated as real estate, and that the same formalities are required to transmit the title as in case of other real property. The estate is treated as a legal one. It will support the action of ejectment. It may be mortgaged and generally dealt with as if the absolute fee were vested in the locator.[11]

A parol agreement for its transfer cannot be enforced.[12]

A conveyance is not an abandonment. Abandonment terminates a right. A conveyance transmits it.[13]

Upon abandonment of a mining claim the land falls back to the public domain. Such abandonment inures to the benefit of no individual except a relocator.[14]

The supreme court of New Mexico holds that a conveyance is equivalent to an abandonment.[15] This is quite true in a limited sense, as there is an estoppel arising from a conveyance. But a conveyance is not an abandonment because it transmits title to a particular person and an abandonment does not have this effect.[16]

[11] *Ante*, § 539.

[12] Reagan v. McKibben, 1 S. D. 270, 76 N. W. 943, 946, 19 Morr. Min. Rep. 556.

[13] Richardson v. McNulty, 24 Cal. 339, 345, 1 Morr. Min. Rep. 11; Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1, 3; Merced Oil Co. v. Patterson, 153 Cal. 624, 96 Pac. 90, 91; Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 1086, 74 Pac. 444; Weed v. Snook, 144 Cal. 439, 77 Pac. 1023, 1025.

[14] Badger G. M. Co. v. Stockton G. & C. M. Co., 139 Fed. 838, 841; Brown v. Gurney, 201 U. S. 184, 192, 26 Sup. Ct. Rep. 509, 50 L. ed. 717.

[15] McAlister v. Hutchinson, 12 N. M. 111, 75 Pac. 41, 42.

[16] Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 224, 7 L. R. A., N. S., 791.

Judge Field, while on the supreme bench of California, announced the doctrine that,—

> The right of the occupant originating in mere possession may, as a matter of course, be lost by abandonment. Where there is title, to preserve it there need be no continuance of possession, and the abandonment of the latter cannot affect the rights held by virtue of the former.[17]

And the supreme court of the United States has said that,—

> There is nothing in the act of congress which makes actual possession any more necessary for the protection of the *title* acquired to such a claim by a valid location, than it is for any other *grant* from the United States.[18]

The abandonment of possession is one thing; the abandonment of a right of exclusive possession and enjoyment granted by a statute which is a muniment of title is another. If the estate of the locator is a legal estate, it can only be divested by abandonment when the circumstances are sufficient to raise an estoppel; but when such abandonment is not accompanied by circumstances sufficient to raise an estoppel, no matter how formal the abandonment may be, if it fall short of a legal deed of conveyance, it has no effect whatsoever upon the title.[19]

There is another consideration which may add some weight to the contention that such an estate cannot be lost or terminated by mere parol abandonment. The statute which creates and authorizes the grant specifies

[17] Ferris v. Coover, 10 Cal. 589, 632.

[18] Belk v. Meagher, 104 U. S. 279, 283, 26 L. ed. 735, 1 Morr. Min. Rep. 510.

[19] Tiedeman on Real Property, § 439; 3 Washburn on Real Property, p. 65.

the conditions under which the estate granted shall be forfeited. The question may be plausibly asked, Can the estate be lost or terminated lawfully in any other manner or for any other cause than that specified in the statute?

The answer to this, in the light of the authority, seems obvious. The ownership of an inchoate right may be abandoned,[20] but the abandonment does not become effectual except in the presence of a relocator. This we understand to be the doctrine specifically sanctioned by the supreme court of the United States,[21] and in that sense is practically equivalent to the forfeiture provided by the statute where the ground is relocated after the original locator has failed to perform his work or has expressly or by implication abandoned all rights to his location.

In a decision by the supreme court of Oregon we find a somewhat involved sentence from which an inference might arise that a *patented* claim might be abandoned, and the area being restored to the public domain could be relocated.[22] But we do not think the court intended such an inference. The divestiture of a vested legal title by abandonment is unknown to the common law unless it result from some estoppel or adverse possession under a statute of limitations.[23]

The United States circuit court for the western district of Pennsylvania thus defines abandonment:—

[20] Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176, 178; Swanson v. Kettler, 17 Idaho, 321, 105 Pac. 1059, 1064.

[21] Brown v. Gurney, 201 U. S. 184, 192, 26 Sup. Ct. Rep. 509, 50 L. ed. 717; Farrell v. Lockhart, 210 U. S. 142, 147, 28 Sup. Ct. Rep. 681, 52 L. ed. 994, 16 L. R. A., N. S., 162.

[22] Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 223, 7 L. R. A., N. S., 791.

[23] Tennessee Oil, Gas & M. Co. v. Brown, 131 Fed. 696, 699, 65 C. C. A. 524, and cases cited.

Legally defined it may be said to be the giving up or relinquishment of property to which a person is entitled with no purpose of again claiming it and without concern as to who may subsequently take possession. . . . . It is the voluntary forsaking or throwing away of property leaving it open to the first-comer. . . . . It may be a question how far a legal vested title to a corporeal hereditament can ever be lost by mere abandonment or neglect, ... although it is held that it may be in Holmes v. Railroad, 8 Am. Law Rep., O. S., 716, and seems to be recognized as possible in Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732, although by nothing short of the statute of limitations as is there said. But with regard to inchoate and particularly mining and other similar rights and privileges, the doctrine is well established. . . . .[24]

§ 643. Distinction between abandonment and forfeiture.—Abandonment is always a question of intention.[25]

[24] Wilmore Coal Co. v. Brown, 147 Fed. 931, 943; affirmed on appeal, Brown v. Wilmore Coal Co., 153 Fed. 143, 82 C. C. A. 295.

[25] Omar v. Soper, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443, 448, 15 Morr. Min. Rep. 496; Mallett v. Uncle Sam M. Co., 1 Nev. 156, 188, 204, 90 Am. Dec. 484, 495, 1 Morr. Min. Rep. 17; Weill v. Lucerne M. Co., 11 Nev. 200, 3 Morr. Min. Rep. 372; Bell v. Bed Rock T. & M. Co., 36 Cal. 214, 218, 1 Morr. Min. Rep. 45; Stone v. Geyser Q. M. Co., 52 Cal. 315, 318, 1 Morr. Min. Rep. 59; Derry v. Ross, 5 Colo. 295, 1 Morr. Min. Rep. 1; St. John v. Kidd, 26 Cal. 263, 272, 4 Morr. Min. Rep. 454; Waring v. Crow, 11 Cal. 367, 371, 5 Morr. Min. Rep. 204; Davis v. Butler, 6 Cal. 510, 511, 1 Morr. Min. Rep. 7; Richardson v. McNulty, 24 Cal. 339, 343, 1 Morr. Min. Rep. 11; Morenhaut v. Wilson, 52 Cal. 263, 267, 1 Morr. Min. Rep. 53; Marshall v. Harney Peak T. M. Co., 1 S. D. 350, 47 N. W. 290, 295; Myers v. Spooner, 55 Cal. 257, 9 Morr. Min. Rep. 519; Dodge v. Marden, 7 Or. 456, 1 Morr. Min. Rep. 63; Trevaskis v. Peard, 111 Cal. 599, 44 Pac. 246, 248; Doe v. Waterloo M. Co., 70 Fed. 455, 458, 17 C. C. A. 190, 18 Morr. Min. Rep. 265; Justice M. Co. v. Barclay, 82 Fed. 554, 559; Valcalda v. Silver Peak Mines, 86 Fed. 90, 95; McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 593, 50 L. R. A. 184, 19 Morr. Min. Rep. 615; Kinney v. Fleming, 6

In forfeiture the element of intent is not involved. It rests entirely upon the statute, and involves only the question, whether the terms of the law have been complied with.[26]

Abandonment operates *instanter*.[27] Where a miner gives up his claim and goes away from it without any intention of returning, and regardless of what may become of it, or who may appropriate it, an abandonment takes place, and the property reverts to its original *status* as part of the unoccupied public domain. It is then *publici juris*, and open to location by the first-comer.[28]

Ariz. 263, 56 Pac. 723, 20 Morr. Min. Rep. 13; McCann v. McMillan, 129 Cal. 350, 62 Pac. 31, 21 Morr. Min. Rep. 6; Buffalo Z. & C. Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572, 576, 22 Morr. Min. Rep. 276; Miller v. Hamley, 31 Colo. 495, 74 Pac. 980, 982; Conn v. Oberto, 32 Colo. 313, 76 Pac. 369, 370; Peoria & Colorado, M. & M. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915, 917; Moffatt v. Blue River Gold Ex. Co., 33 Colo. 142, 80 Pac. 139, 141; Ritter v. Lynch, 123 Fed. 930, 935; Peachy v. Gaddis (Ariz.), 127 Pac. 739, 741; King Solomon T. & D. Co. v. Mary Verna M. Co., 22 Colo. App. 528, 127 Pac. 129, 131; Peachy v. Frisco Gold Mines Co., 204 Fed. 659, 668.

[26] St. John v. Kidd, 26 Cal. 263, 272, 4 Morr. Min. Rep. 454; Bell v. Bed Rock T. & M. Co., 36 Cal. 214, 218, 1 Morr. Min. Rep. 45; McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 593, 50 L. R. A. 184, 19 Morr. Min. Rep. 615; McKay v. McDougall, 25 Mont. 258, 87 Am. St. Rep. 395, 64 Pac. 669, 670.

[27] Brown v. Gurney, 201 U. S. 184, 192, 26 Sup. Ct. Rep. 509, 50 L. ed. 717; National M. & M. Co. v. Piccolo, 54 Wash. 617, 104 Pac. 128, 129, reversed on rehearing but not on this point, 57 Wash. 572, 107 Pac. 353.

[28] Derry v. Ross, 5 Colo. 295, 1 Morr. Min. Rep. 1; Davis v. Butler, 6 Cal. 510, 511, 1 Morr. Min. Rep. 7; Richardson v. McNulty, 24 Cal. 339, 343, 1 Morr. Min. Rep. 11; Mallett v. Uncle Sam M. Co., 1 Nev. (156) 188, 90 Am. Dec. 484, 1 Morr. Min. Rep. 17; Morenhaut v. Wilson, 52 Cal. 263, 267; St. John v. Kidd, 26 Cal. 263, 272, 4 Morr. Min. Rep. 454; Harkrader v. Carroll, 76 Fed. 474, 475; McKay v. McDougall, 25 Mont. 258, 87 Am. St. Rep. 395, 64 Pac. 669; Miller v. Hamley, 31 Colo. 495, 74 Pac. 980, 982; Conn v. Oberto, 32 Colo. 313, 76 Pac. 369, 370; Davis v. Dennis, 43 Wash. 54, 85 Pac. 1079, 1080;

Forfeiture is not complete until someone else enters with intent to relocate the property.[29]

Abandonment may occur at any time, even after full compliance with the law as to performance of annual labor. Forfeiture will only ensue upon the lapse of the statutory period, upon failure to represent the claim, and upon entry and location by another. An exception to this rule is noted in Alaska, where a failure to perform the necessary work terminates the estate without the intervention of a relocator.[30]

Abandonment may be proved under the general issue.[31]

Forfeiture as a defense to an action must be specially pleaded,[32] provided the pleadings are sufficiently

Farrell v. Lockhart, 210 U. S. 142, 147, 28 Sup. Ct. Rep. 681, 52 L. ed. 994, 16 L. R. A., N. S., 162; Street v. Delta M. Co., 42 Mont. 371, 112 Pac. 701, 705.

[29] Little Gunnell M. Co. v. Kimber, 1 Morr. Min. Rep. 536, 539, Fed. Cas. No. 8402; Lakin v. Sierra Buttes G. M. Co., 25 Fed. 337, 343, 11 Saw. 231, 241; McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 593, 50 L. R. A. 184, 19 Morr. Min. Rep. 615; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 958, 20 Morr. Min. Rep. 591; Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 85, 68 L. R. A. 833, and note; Field v. Tanner, 32 Colo. 278, 75 Pac. 916; Cunningham v. Pirrung, 9 Ariz. 288, 80 Pac. 329, 331; National M. & M. Co. v. Piccolo, 54 Wash. 617, 104 Pac. 128, 130; reversed on rehearing but not on the point, 57 Wash. 572, 107 Pac. 353; Bingham Amalgamated Copper Co. v. Ute Copper Co., 181 Fed. 748, 749.

[30] Thatcher v. Brown, 190 Fed. 708, 711, 111 C. C. A. 436.

[31] Wilson v. Cleaveland, 30 Cal. 192, 200; Bell v. Bed Rock T. & M. Co., 36 Cal. 214, 218, 1 Morr. Min. Rep. 45; Bell v. Brown, 22 Cal. 671, 681, 5 Morr. Min. Rep. 540; Morenhaut v. Wilson, 52 Cal. 263, 268; Trevaskis v. Peard, 111 Cal. 599, 44 Pac. 246, 247.

The supreme court of Montana, while not undertaking to decide the question, intimated that it would be safer to plead abandonment. McShane v. Kenkle, 18 Mont. 208, 56 Am. St. Rep. 578, 44 Pac. 979, 982, 33 L. R. A. 851.

[32] Renshaw v. Switzer, 6 Mont. 464, 13 Pac. 127, 128, 15 Morr. Min. Rep. 345; Garfield M. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153, 155; Morenhaut v. Wilson, 52 Cal. 263, 268; Mattingly v. Lewisohn,

certain as to description and identification as to specific title claimed.[33]

The rule as to necessity for pleading forfeiture does not obtain necessarily in proceedings to determine adverse claims under section twenty-three hundred and twenty-six of the Revised Statutes, where the title of each party is put in issue.[34] Nor is the plaintiff in the case in other forms of actions compelled to anticipate the defense of his adversary and allege forfeiture of a claim which the defendant may set up. In states where no special replication is required to be filed to the answer, and where the general allegation of ownership is sufficient to support an action involving disputed claims to mining locations,[35] the counter-allegations of ownership in the answer are deemed to be

13 Mont. 508, 35 Pac. 111, 114; Bishop v. Baisley, 28 Or. 119, 41 Pac. 936, 939; Wulf v. Manuel, 9 Mont. 276, 279, 286, 23 Pac. 723; S. C., reversed on appeal, but not on this point, 152 U. S. 505, 14 Sup. Ct. Rep. 651, 38 L. ed. 532, 18 Morr. Min. Rep. 85; Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. 1047, 1048, 18 Morr. Min. Rep. 410; Power v. Sla, 24 Mont. 243, 61 Pac. 468, 471; Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036, 1038, 21 Morr. Min. Rep. 470; S. C., in error *sub nom.*, Yosemite M. Co. v. Emerson, 208 U. S. 25, 28 Sup. Ct. Rep. 196, 52 L. ed. 374; Copper Mt. M. & S. Co. v. Butte & Corbin C. & S. Co., 39 Mont. 487, 133 Am. St. Rep. 595, 104 Pac. 540; Duncan v. Eagle Rock G. M. & R. Co., 48 Colo. 569, 139 Am. St. Rep. 288, 111 Pac. 588.

33 Harper v. Hill, 159 Cal. 250, 113 Pac. 163, 166, 1 Water & Min. Cas. 585.

34 Steel v. Gold Lead M. Co., 18 Nev. 80, 1 Pac. 448, 450, 15 Morr. Min. Rep. 293; Merchants' Exchange Bank v. McKeown, 60 Or. 325, 119 Pac. 334.

As to what is necessary to be alleged and proved in this class of actions and the relationship between the state courts and the land department, see subject of "Adverse Claims" in a succeeding chapter.

35 Contreras v. Merck, 131 Cal. 211, 63 Pac. 336, 337; Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708, 709; Holmes v. Salamania G. M. Co., 5 Cal. App. 659, 91 Pac. 160.

denied, and forfeiture may be proved under the general issue.[36]

Where, however, either abandonment or forfeiture are relied upon, the burden of proof rests with the party asserting it.[37]

An exception, however, to this last rule may be noted. Where a party shows that no work was performed by his adversary within the limits of a claim he makes out a *prima facie* case, and thereafter, should such adversary depend upon labor done outside the claim, the burden is cast upon him of proving the performance of such labor and proving that its reasonable tendency is to benefit the claim.[38]

§ 644. Acts constituting abandonment—Evidence establishing or negativing it.—Ordinarily, abandon-

[36] Goldberg v. Bruschi, 146 Cal. 708, 81 Pac. 23, 24.

[37] Oreamuno v. Uncle Sam M. Co., 1 Nev. 215, 1 Morr. Min. Rep. 32; Quigley v. Gillett, 101 Cal. 462, 35 Pac. 1040, 1042, 18 Morr. Min. Rep. 68; Colman v. Clements, 23 Cal. 245, 248, 5 Morr. Min. Rep. 247; Bishop v. Baisley, 28 Or. 119, 41 Pac. 936, 939; Johnson v. Young, 18 Colo. 625, 34 Pac. 173; Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708, 709; Axiom M. Co. v. White, 10 S. D. 198, 72 N. W. 462, 463; Dibble v. Castle Chief G. M. Co., 9 S. D. 618, 70 N. W. 1055, 1056; Beals v Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 958, 20 Morr. Min. Rep. 591; Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 934; Haynes v. Briscoe, 29 Colo. 137, 67 Pac. 156, 157; Buffalo Z. & C. Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572, 576, 22 Morr. Min. Rep. 276; Callahan v. James, 141 Cal. 291, 74 Pac. 853, 854; Field v. Tanner, 32 Colo. 278, 75 Pac. 916, 918; Cunningham v. Pirrung, 9 Ariz. 288, 80 Pac. 329, 331; Goldberg v. Bruschi, 146 Cal. 708, 81 Pac. 23, 24; Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600, 602; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 219, 60 C. C. A. 155, 22 Morr. Min. Rep. 622; McCulloch v. Murphy, 125 Fed. 147, 150; Whalen Consol. Copper Co. v. Whalen, 127 Fed. 611; Wailes v. Davies, 158 Fed. 667, 669; S. C., on appeal, 164 Fed. 397, 90 C. C. A. 385.

[38] Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 934; Copper Mt. M. & S. Co. v. Butte & Corbin Cons. C. & S. M. Co., 39 Mont. 487, 133 Am. St. Rep. 595, 104 Pac. 540, 542.

ment is a question of fact to be determined by the jury,[39] although, under certain conditions, it may become a question of law to be declared by the court, particularly where the facts are undisputed.[40] No arbitrary rule can be laid down which will satisfy all cases. The question being one purely of intent, the fact is to be determined by the acts and conduct of the party. It may be express or implied; it may be effected by a plain declaration of intention to abandon;[41] and it may be inferred from acts or failures to act, so inconsistent with an intention to retain it, that the unprejudiced mind is convinced of the renunciation.[42]

An abandonment may be effected by an instrument of relinquishment filed in the land office even after entry made in the patent proceeding. When made it takes effect from the date of filing, not from the date of the order canceling the entry.[43]

Upon a question of abandonment, as upon a question of fraud, a wide range is allowed, for it is generally only from facts and circumstances that the truth is to be discovered, and both parties should be allowed to prove any fact or circumstance from which any

[39] Lockhart v. Wills, 9 N. M. 263, 50 Pac. 318, 320; McCann v. McMillan, 129 Cal. 350, 62 Pac. 31, 21 Morr. Min. Rep. 6; Taylor v. Middleton, 67 Cal. 656, 8 Pac. 594, 595, 15 Morr. Min. Rep. 284; Myers v. Spooner, 55 Cal. 257, 260, 9 Morr. Min. Rep. 519.

[40] Wilmore Coal Co. v. Brown, 147 Fed. 931, 943; affirmed on appeal, 153 Fed. 143, 82 C. C. A. 295.

[41] Conn v. Oberto, 32 Colo. 313, 76 Pac. 369, 370; Oberto v. Smith, 37 Colo. 21, 86 Pac. 86; Brown v. Gurney, 201 U. S. 184, 192, 26 Sup. Ct. Rep. 509, 50 L. ed. 717.

[42] North American Exploration Co. v. Adams, 104 Fed. 404, 405, 45 C. C. A. 185.

[43] Gurney v. Brown, 32 Colo. 472, 77 Pac. 357, 359; Brown v. Gurney, 201 U. S. 184, 193, 26 Sup. Ct. Rep. 509, 50 L. ed. 717.

aid for the solution of the question can be derived.[44] The *animus revertendi* is the simple test.[45] There must be a leaving of the claim without any intention of returning or making any further use of it, to sustain the charge of abandonment. The leaving having been shown, it is competent for the opposite party to show any acts explaining it.[46]

If tools or mining implements are left on the ground, this fact would be a circumstance negativing the idea of abandonment.[47]

The employment of a watchman, although his salary might not be an element to be considered in the computation of annual labor, may be evidence to negative abandonment and establish possession.[48]

Mere failure by one colocator to contribute his proportion of the expense of performing assessment work, does not deprive him of his interest in the property,[49] and would not be conclusive evidence of an intention to abandon, although it is a circumstance which may be considered in connection with others.[50]

Permission given to others to relocate operates as an abandonment.[51]

[44] Willson v. Cleveland, 30 Cal. 192, 201; Bell v. Bed Rock T. & M. Co., 36 Cal. 214, 218, 1 Morr. Min. Rep. 45.

[45] Stone v. Geyser Q. M. Co., 52 Cal. 315, 318, 1 Morr. Min. Rep. 59; Valcalda v. Silver Peak Mines, 86 Fed. 90, 95. See Kinney v. Fleming, 6 Ariz. 263, 56 Pac. 723, 724, 20 Morr. Min. Rep. 13; Buffalo Z. & C. Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572, 576, 22 Morr. Min. Rep. 276.

[46] Bell v. Bed Rock T. & M. Co., 36 Cal. 214, 218, 1 Morr. Min. Rep. 45; Ritter v. Lynch, 123 Fed. 930, 935.

[47] Harkness v. Burton, 39 Iowa, 101; S. C., on appeal, 9 Morr. Min. Rep. 318; Morenhaut v. Wilson, 52 Cal. 263, 267, 1 Morr. Min. Rep. 53.

[48] Justice M. Co. v. Barclay, 82 Fed. 554, 562.

[49] Faubel v. McFarland, 144 Cal. 717, 78 Pac. 261, 262.

[50] Oreamuno v. Uncle Sam M. Co., 1 Nev. 215, 1 Morr. Min. Rep. 32; Waring v. Crow, 11 Cal. 367, 372, 5 Morr. Min. Rep. 204.

[51] Conn v. Oberto, 32 Colo. 313, 76 Pac. 369, 370.

Lapse of time, absence from the ground, or failure to work it for any definite period, unaccompanied by other circumstances, are not evidence of abandonment.[52]

An erroneous patent survey, if corrected before patent, does not operate as an abandonment of area improperly omitted by the surveyor.[53]

An original application for patent which expressly excludes a certain conflict area of land is not in itself such an abandonment or waiver of the applicant's right thereto, as to preclude his filing a supplemental application covering such tract.[54]

A party owning a mining claim may, on application for patent, exclude land covered by an adverse claim and take patent for the land not in conflict, without waiving his possessory right to the remainder.[55]

Even in the absence of any adverse claim it would seem that a claimant could apply for a patent for a part of his claim without waiving his right to the remainder, although the part applied for included the discovery and workings, particularly where he retained possession and performed work on the part not applied for;[56] or when given the right to elect as to which of two tracts segregated by conflicting areas excepted he

[52] Mallett v. Uncle Sam M. Co., 1 Nev. (188) 157, 90 Am. Dec. 484, 1 Morr. Min. Rep. 17; Wade's Am. Min. Law, § 33; Seamen v. Vawdrey, 16 Ves. Jr. 390; S. C., 13 Morr. Min. Rep. 62; Partridge v. McKinney, 10 Cal. 181, 183, 1 Morr. Min. Rep. 185; Dodge v. Marden, 7 Or. 456; S. C., 1 Morr. Min. Rep. 63; Buffalo Z. & C. Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572, 577, 22 Morr. Min. Rep. 276; Valcalda v. Silver Peak Mines, 86 Fed. 90, 95; McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 593, 50 L. R. A. 184, 19 Morr. Min. Rep. 615.

[53] Basin M. & C. Co. v. White, 22 Mont. 147, 55 Pac. 1049, 1050.

[54] Fox v. Mutual M. & M. Co., 31 L. D. 59.

[55] Black Queen Lode & Excelsior Lode, 22 L. D. 343; Branagan v. Dulaney, 2 L. D. 744, 11 C. L. O. 67.

[56] Miller v. Hamley, 31 Colo. 495, 74 Pac. 980, 982.

will take patent for, such election does not necessarily extinguish his location rights as to the other tract.[57]

Where, after the filing of an adverse claim, and during the pendency of an action to establish the same, the adverse claimant filed an application with the land department and obtained a patent for part of the claim not in conflict with the prior patent applicant, the obtaining of such a patent did not operate as a waiver of his adverse claim.[58]

A patent is not essential to the enjoyment of a mining claim held under a valid location; hence the failure of a mineral applicant to prosecute his application for patent is not in itself an abandonment of the claim.[59]

Mere amendment of a location is not an abandonment of the original.[60] Nor is an attempted relocation by the owner, if the relocation is invalid.[61]

The declarations of a party against his own interest, accompanying his removal from the claim, would certainly be admissible to show intent, and this independent of the fact that others acted upon such declarations, which would involve the element of estoppel. Estoppel *in pais* does not constitute an element in abandonment, nor is it one of the circumstances from which an abandonment may be found.[62]

It has been held that, when the question of abandonment is in issue, the declarations in his own favor, made py the party against whom it is alleged, negativing any intention to abandon, may be admitted in

[57] Peoria and Colorado M. & M. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915, 917.

[58] Mackay v. Fox, 121 Fed. 487, 490, 57 C. C. A. 439.

[59] Coleman v. McKenzie, 28 L. D. 348.

[60] *Ante*, § 398.

[61] Temescal O. & M. Co. v. Salcido, 137 Cal. 211, 69 Pac. 1010, 1011, 22 Morr. Min. Rep. 360.

[62] Marquart v. Bradford, 43 Cal. 526, 529, 5 Morr. Min. Rep. 528.

evidence for the special purpose only of showing an absence of such intention.[63] Abandonment may also be proved by the acts and conduct of a party, even against his express declarations to the contrary.[64]

It has been held by the supreme court of Colorado, that where the owners of a mining claim convey a portion of it and subsequently abandon the claim, the right of the grantees to occupy the conveyed portion terminates. The entire claim in such abandonment becomes open to relocation, and the grantees of the original locators cannot hold possession against the relocator.[65] The reasoning upon which the opinion is based is not convincing, and the doctrine is unsupported.

§ 645. **Forfeiture.**—The penalty for failure to comply with the requirements of the law, in respect to the performance of annual labor, is found in section twenty-three hundred and twenty-four of the Revised Statutes:—

> Upon a failure to comply with these conditions, the claim or mine upon which such failure occurs shall be open to relocation in the same manner as if no location of the same had ever been made.

The term "forfeiture" does not appear in the statute, but the courts employ it as a comprehensive word indicating a legal result flowing from a breach of con-

[63] Noble v. Sylvester, 42 Vt. 146, 150, 12 Morr. Min. Rep. 62; Rush v. French, 1 Ariz. 99, 25 Pac. 816, 830; Tait v. Hall, 71 Cal. 149, 12 Pac. 391, 392; Lewis v. Burns, 106 Cal. 381, 39 Pac. 778, 779; International & G. N. Ry. Co. v. Anderson, 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039, 1040, and authorities there cited.

[64] Trevaskis v. Peard, 111 Cal. 599, 605, 44 Pac. 246, 248; Myers v. Spooner, 55 Cal. 257, 260, 9 Morr. Min. Rep. 519; McCann v. McMillan, 129 Cal. 350, 62 Pac. 31, 32, 21 Morr. Min. Rep. 6.

[65] Conn v. Oberto, 32 Colo. 313, 76 Pac. 369, 370.

dition subsequent, subject to which the locator acquires his title.[66]

In a previous section we have noted the distinction between forfeiture and abandonment, and have there enumerated the leading characteristics of both.[67] We have heretofore observed the reluctance with which the courts enforce this penalty.[68] They have settled the doctrine that the forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law.[69]

While it is often said that a forfeiture can be shown only upon "clear and convincing evidence," the proof is made as required whenever it is shown by a preponderance of the evidence that the full amount of annual labor or improvements was not made or expended within a given year.[70]

66 McCulloch v. Murphy, 125 Fed. 147, 150.

67 § 643.

68 § 624.

69 Hammer v. Garfield M. & M. Co., 130 U. S. 291, 301, 9 Sup. Ct. Rep. 548, 32 L. ed. 964, 16 Morr. Min. Rep. 125; Strasburger v. Beecher, 20 Mont. 143, 49 Pac. 740, 742; Axiom M. Co. v. White, 10 S. D. 198, 72 N. W. 462, 463; Justice M. Co. v. Barclay, 82 Fed. 554, 559; Dibble v. Castle Chief G. M. Co., 9 S. D. 618, 70 N. W. 1055; Providence G. M. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641, 19 Morr. Min. Rep. 625; Power v. Sla, 24 Mont. 243, 61 Pac. 468, 471; Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036, 1038, 21 Morr. Min. Rep. 470; Buffalo Z. & C. Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572, 577, 22 Morr. Min. Rep. 276; Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600, 602; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 287; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 219, 60 C. C. A. 155, 22 Morr. Min. Rep. 622; McCulloch v. Murphy, 125 Fed. 147, 150; McKay v. Neussler, 148 Fed. 86, 88, 78 C. C. A. 154.

70 Big Three M. & M. Co. v. Hamilton, 157 Cal. 130, 137 Am. St. Rep. 118, 107 Pac. 301, 304; Nevada Exploration Co. v. Spriggs (Utah), 124 Pac. 770, 773; Copper Mt. M. & S. Co. v. Butte & Corbin Consol. M. Co., 39 Mont. 487, 133 Am. St. Rep. 595, 104 Pac. 540, 542; Tiggeman

The courts do not incline to the enforcement of this class of penalties, which have always been deemed in law odious.[71]

Of course, while a claim is subject to relocation for failure to perform the requisite annual labor, no forfeiture is worked, and the estate of the locator is not divested until there has been a peaceable entry for the purpose of perfecting the relocation. The right of the original claimant is terminated only by the entry of a new one.[72]

v. Mrzlak, 40 Mont. 19, 105 Pac. 77, 81; Swanson v. Kettler, 17 Idaho, 321, 105 Pac. 1059, 1061.

[71] Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439, 457, Fed. Cas. No 9886, 9 Morr. Min. Rep. 616; Belcher Cons. G. M. Co. v. Defarrari, 62 Cal. 160, 163; Quigley v. Gillett, 101 Cal. 462, 35 Pac. 1040, 1042, 18 Morr. Min. Rep. 68; Johnson v. Young, 18 Colo. 625, 34 Pac. 173, 175; Book v. Justice M. Co., 58 Fed. 106, 118, 17 Morr. Min. Rep. 617; Colman v. Clements, 23 Cal. 245, 248, 5 Morr. Min. Rep. 247; Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036, 1038, 21 Morr. Min. Rep. 470; S. C., in error, *sub nom.*, Yosemite M. Co. v. Emerson, 208 U. S. 25, 28 Sup. Ct. Rep. 196, 52 L. ed. 374; Crown Point G. M. Co. v. Crismon, 39 Or. 364, 65 Pac. 87, 21 Morr. Min. Rep. 406; Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600, 602; National M. & M. Co. v. Piccolo, 54 Wash. 617, 104 Pac. 128, 130; reversed on rehearing but not on this point, Murray v. Osborne, 33 Nev. 267, 111 Pac. 31, 34.

[72] Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176, 178; Bingham Amalgamated Copper Co. v. Ute Copper Co., 181 Fed. 748, 750; Little Gunnell M. Co. v. Kimber, Fed. Cas. No. 8402, 1 Morr. Min. Rep. 536, 539; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 958, 20 Morr. Min. Rep. 591; McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 593, 50 L. R. A. 184, 19 Morr. Min. Rep. 615; Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 86, 68 L. R. A. 833, and note; Field v. Tanner, 32 Colo. 278, 75 Pac. 916, 919; Cunningham v. Pirrung, 9 Ariz. 288, 80 Pac. 329, 331; National M. & M. Co. v. Piccolo, 54 Wash. 617, 104 Pac. 128, 130; Snowy Peak M. Co. v. Tamarack & Chesapeak M. Co., 17 Idaho, 630, 107 Pac. 60, 61; Barklage v. Russell, 29 L. D. 401; In re Wolenberg, 29 L. D. 302, 304; Neilson v. Champagne M. Co., 29 L. D. 491; Coleman v. McKenzie, 29 L. D. 359; Marburg Lode Mining Claim, 30 L. D. 202, 206; Peachy v. Gaddis (Ariz.), 127 Pac. 739, 742.

We have heretofore dealt with the subject of forfeiture for failure to comply with the requirements of local rules other than those governing the subject of annual labor,[73] and have also considered the effect of a failure to comply with the provisions of state laws regulating the manner of initiating and perfecting locations.[74] The class of forfeitures which we are now considering are those only which may result from a failure to perform the annual labor required by the federal law.

Succinctly stated, the rule is, that the work prescribed in the act must be done, or the claim is open to relocation, and a forfeiture may thus ensue.[75]

The subject of relocation after the original claimant has failed to comply with the law is fully discussed in a preceding article.[76]

§ 645a. Effect of abandonment or forfeiture by senior upon rights of junior conflicting locators.—We have heretofore observed that surface conflicts of mining claims are more than frequent, the rights of the respective parties being in such cases determined by priority, and while for certain limited purposes the lines of a junior location may be placed upon or over those of a senior, the rule is clearly established that so long as the senior location remains valid and subsisting, the junior claimant can acquire no right whatever as against the senior claimant. Such junior location is void as against the senior.

But it is a matter of common occurrence that after the location of the junior conflicting claim the senior

[73] *Ante*, § 274.

[74] *Ante*, §§ 384, 390.

[75] Russell v. Brosseau, 65 Cal. 605, 4 Pac. 643, 645; Du Prat v. James, 65 Cal. 555, 4 Pac. 562, 563, 15 Morr. Min. Rep. 341.

[76] §§ 402, 409.

locator fails to perform his annual work or in rare instances abandons his location, though not in default as to assessment work. The question then arises, What becomes of the conflict area? Is the junior location void *ab initio* as to such conflict or will the conflict area fall by gravity to the junior locator without the necessity of his relocating the abandoned ground?

The supreme court of the United States in Belk v. Meagher[77] thus laid down the rule:—

> Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim and left the property open for another to take up. . . . . A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator but all the world, because the law allows no such thing to be done. . . . . To hold that before the former location has expired an entry may be made and the several acts done necessary to protect a relocation will be to encourage unseemly contests about the possession of the public mineral bearing lands, which would almost necessarily be followed by breaches of the peace.[78]

[77] 104 U. S. 279, 284, 26 L. ed. 739, 1 Morr. Min. Rep. 510.

[78] The supreme court of South Dakota expressed the view that if the claim of the prior location is abandoned or forfeited, or any part of the claim in conflict is not rightfully held by the prior locator, the subsequent location attaches to so much of the ground not legally held by the prior locator as is within the lines of the subsequent location. McPherson v. Julius, 17 S. D. 98, 95 N. W. 428, 435. But in this case the conflict area involved an excess over the amount of the statutory allowance, and the junior location covered this excess. The opinion is partly *obiter*. In a later case to be noted in the text the court followed Belk v. Meagher.

This rule was generally recognized in the lower courts wherever the question arose,[79] until the supreme court of the United States in deciding the case of Lavagnino v. Uhlig[80] employed language which seemed to be contrary to the rule laid down in Belk v. Meagher, which latter case was not mentioned by the court in its decision. The facts involved and the point decided in Lavagnino v. Uhlig may be explained by the use of a diagram here inserted as figure 125A.

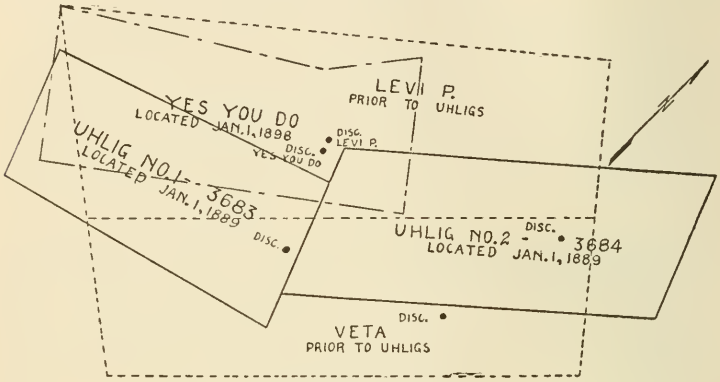


FIGURE 125A.

As to priorities the Levi P. and Veta were first in time, the Uhligs 1 and 2 next and the Yes You Do the junior claim. Uhlig applied for patent to Uhlig No. 1 and 2. Lavagnino, owner of the Yes You Do, adversed in the land office as to the area in conflict, and in due course instituted the adverse suit in question. The

[79] Oscamp v. Crystal River M. Co., 58 Fed. 293, 295, 7 C. C. A. 233, 17 Morr. Min. Rep. 651; Jordan v. Duke, 6 Ariz. 55, 53 Pac. 197, 201; Reynolds v. Pascoe, 24 Utah, 219, 66 Pac. 1064, 1065; Malone v. Jackson, 137 Fed. 878, 881, 70 C. C. A. 216; Peoria, Colorado M. & M. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915, 917; Gurney v. Brown, 32 Colo. 472, 77 Pac. 357.

[80] 198 U. S. 443, 25 Sup. Ct. Rep. 716, 49 L. ed. 1119. For a discussion of this case and its modification of the rule in Belk v. Meagher, see note to Wilson v. Freeman, 68 L. R. A. 842.

owners of the Levi P. and Veta failed to adverse and were not parties to the litigation which ensued.

In the trial court the testimony established that Smith, a deputy United States mineral surveyor, located the Yes You Do claim on January 1, 1898, eight years after the location of the Uhligs, and was interested in the litigation though he had transferred his location title to Lavagnino. A certified copy of the Yes You Do and deed to Lavagnino was offered in the trial court and rejected on the ground that Smith being a deputy mineral surveyor was disqualified from making the location and it was void. Upon this ruling Lavagnino rested. The defendants, claimants of the Uhligs, introduced evidence in support of their title to these claims. In rebuttal Lavagnino, plaintiff, offered to show that the Levi P. and Veta, in which he had no interest, were valid and subsisting claims and embraced the discoveries of both the Uhligs, at the time of the location of the Uhligs, and were then owned by one Mayberry, who was not a party to the litigation. Allegations to this effect were made in the complaint. The objection of defendant to the introduction of this testimony was sustained by the trial court on the ground that as no adverse claim based upon the Levi P. and Veta claims had been made within the prescribed period, whatever rights the parties may have had to said claims were waived by failure to adverse the application for patent for the Uhligs.

This view was sustained by the supreme court of Utah.[81] The supreme court of the United States in affirming the decision of the supreme court of Utah held:—

[81] Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 22 Morr. Min. Rep. 610.

> That if there be a senior locator possessed of paramount rights in the mineral lands for which patent is sought, he may abandon such rights and cause them in effect to inure to the benefit of the applicant for patent by failure to adverse, or after adversing, by failure to prosecute such adverse. . . . . Of course, the effect of the construction which we have thus given to section 2326 of the Revised Statutes is to cause the provision of that section to qualify sections 2319 and 2324, thereby preventing mineral lands of the United States which have been the subject of conflicting locations from becoming *quoad* the claims of third parties, unoccupied mineral lands by the mere forfeiture of one of such locations.[82]

It is interesting to note the attitude of the lower courts as to this decision, and its effect upon the rule in Belk v. Meagher. These courts at times wavered between a desire to avoid the imputation of judicial insubordination and a conviction that the supreme court of the United States had made a serious mistake. As the attitude of these courts ultimately resulted in securing from the supreme court of the United States a return to the rule in Belk v. Meagher, and a modification if not a complete reversal of the doctrine announced in Lavagnino v. Uhlig, we will present their views.

The supreme court of Colorado in Hoban v. Boyer[83] ruled, notwithstanding the decision in Lavagnino v. Uhlig, to which it does not refer, that in a suit in support of an adverse claim the defendant may show that the plaintiff's location was made upon ground embraced within a prior valid subsisting location, and if he succeeds in the same it is a bar to plaintiff's re-

[82] 198 U. S. 443, 455, 456, 25 Sup. Ct. Rep. 716, 49 L. ed. 1119.

[83] 37 Colo. 185, 85 Pac. 837.

covery. It may be observed, however, that Brown v. Gurney hereafter referred to had been decided by the supreme court of the United States, but is not cited in the opinion.

In Sierra Blanca Mining and Reduction Co. v. Winchell,[84] decided shortly after the decision in Lavagnino v. Uhlig, the same court held that the failure to perfect a location by performing all the acts in the series required by the state law would not inure to the benefit of an intervening junior locator. No mention is made of either Belk v. Meagher or Lavagnino v. Uhlig.

In Moorhead v. Erie M. & M. Co.[85] the same court applied the doctrine of Belk v. Meagher, citing it in support of its ruling without making any mention of either Lavagnino v. Uhlig or Brown v. Gurney.

The supreme court of Montana in Helena Gold & Iron Co. v. Baggaley[86] applied the doctrine of Lavagnino v. Uhlig, holding that where a senior locator performs the initial step in a series required under the state law to complete a location, and subsequently fails to perform the remaining acts, such failure does not in the presence of an intervening junior locator restore the land to the public domain, but inures to the benefit of such junior location. The court accepts the doctrine of Lavagnino v. Uhlig as final, without comment or criticism.

The supreme court of Idaho in Ambergris M. Co. v. Day[87] said:—

> It has been generally understood throughout the mining states that Belk v. Meagher had become the settled law to the effect that no valid relocation can

[84] 35 Colo. 13, 83 Pac. 628.
[85] 43 Colo. 408, 96 Pac. 254, 256.
[86] 34 Mont. 464, 87 Pac. 455, 459.
[87] 12 Idaho, 108, 85 Pac. 109, 114.

be made on a mining claim until the rights of the former relocator have been finally forfeited or abandoned and that a location made after the forfeiture or abandonment would take precedence over such invalid relocation; but Lavagnino v. Uhlig decided less than a year ago appears to have entirely upset the doctrine, and it will be a matter of great interest to the lawyers and courts as well as the miners of these Western States to know just whether these cases are distinguishable or the one overrules the other entirely.

In Lockhart v. Farrell[88] the supreme court of Utah reviewed the decision of the supreme court of the United States in the Lavagnino-Uhlig case, and differentiated it. In Lockhart v. Farrell the discovery of the junior location was within the limits of the senior claim. In the Lavagnino case it was observed that there was nothing in the opinion of the supreme court of the United States which justified the assertion that the Uhlig discoveries were within the limits of the Levi P. or Veta. But the offer was made in the trial court to prove that fact among others. The ruling sustained the objection to the evidence tendered, and it was this ruling which was taken to the supreme court of the United States and affirmed. The diagram heretofore presented as figure 125A shows both Uhlig discoveries to be within the limits of the Veta, admittedly a prior claim. This diagram was made from maps used at the trial and probably exhibited the facts. While no stress was laid upon this in the opinion of the United States court, we do not, considering the rejected offer which raised the question, see how the Lavagnino case can be differentiated from the Lockhart-Farrell case, nor do we think even

[88] 31 Utah, 155, 86 Pac. 1077, 1078.

if the facts were otherwise that there is any difference in principle between the two cases. The supreme court of Utah, however, relied also upon the decision of the supreme court of the United States in Brown v. Gurney, which indicated a probable return by that court to the Belk-Meagher doctrine.

The supreme court of Nevada, in Nash v. McNamara[89] made the most complete analysis of the Belk-Meagher and Lavagnino-Uhlig cases of any of the state courts, and in adhering to the doctrine of Belk v. Meagher took the position that the supreme court of the United States in deciding Lavagnino v. Uhlig did not intend to overrule Belk v. Meagher.

In deciding the case of Brown v. Gurney[90] the supreme court of the United States had under consideration a state of facts illustrated by figure 125B, which accompanies the opinion.

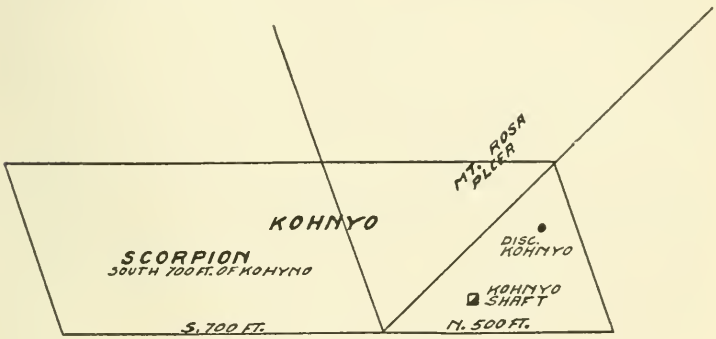


FIGURE 125B.

The Kohnyo claim was divided into two noncontiguous tracts by the Mt. Rosa Placer. Upon application for patent the local land officers allowed the entry, but

[89] 30 Nev. 114, 133 Am. St. Rep. 694, 93 Pac. 405, 16 L. R. A., N. S., 168.

[90] 201 U. S. 184, 26 Sup. Ct. Rep. 509, 50 L. ed. 717.

the general land office compelled the applicant to elect which of the two segregated tracts it would take, as, under the practice then obtaining, patent would not be issued for two segregated tracts based on one discovery.

The applicants elected to take the tract (north five hundred feet) containing the discovery, and filed an instrument indicating such election June 14, 1898. The entry as to the south seven hundred feet was thereafter canceled, the order of cancellation being dated July 15, 1898. The north seven hundred feet shown on the diagram as the Scorpion was claimed by three adverse locators. The Scorpion was located May 13, 1898, the Hobson's Choice June 23, 1898, and the P. G. July 16, 1898. The Scorpion was thus located prior to the election of the Kohnyo to take the north five hundred feet; in other words, the location of the Scorpion was made of a tract covered by a subsisting entry. The Hobson's Choice was located after the election of the Kohnyo, which was equivalent to an abandonment of the south seven hundred feet. The P. G. was located on the day following the formal cancellation of the entry as to the south seven hundred feet, and the question was which had the better right to the ground. The owner of the Scorpion invoked the doctrine of Lavagnino v. Uhlig,[91] and claimed that the subsequent abandonment of the area by the Kohnyo owners inured to its benefit. The Hobson's Choice claimed that the ground reverted to the public domain immediately upon the filing of the election by the Kohnyo owners to take the north five hundred feet, and that as the Hobson's Choice was located

[91] See argument of counsel, 201 U. S. 187, 26 Sup. Ct. Rep. 509, 50 L. ed. 717.

shortly after the filing of the election, its location was the only valid one. The owners of the P. G. claimed that the area did not become restored to the public domain until after the formal cancellation of the Kohnyo entry July 15, 1898.

The decision was in favor of the Hobson's Choice, the court holding that the election of the Kohnyo owners to take the north five hundred feet operated *eo instanti* as an abandonment taking effect on its being filed in the land office. The Scorpion was held to be void, which was tantamount to a ruling that the claim was not entitled to receive the benefit of the subsequent abandonment by the Kohnyo owners of the south seven hundred feet covered by the Scorpion location. The court did not mention either Belk v. Meagher or Lavagnino v. Uhlig.

In Farrell v. Lockhart,[92] the supreme court of the United States expressed the view that the opinion in Lavagnino v. Uhlig

> should be qualified so as not to exclude the right of a subsequent locator on an adverse claim to test the lawfulness of a prior location of the same mining ground upon the contention that at the time such prior location was made, the ground embraced therein was covered by a valid and subsisting mining claim.

And in the subsequent case of Swanson v. Sears,[93] the court distinctly held that

> a location and discovery on land withdrawn *quoad hoc* from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right.

92 210 U. S. 142, 146, 28 Sup. Ct. Rep. 681, 683, 52 L. ed. 994, 16 L. R. A., N. S., 162.

93 224 U. S. 180, 181, 32 Sup. Ct. Rep. 455, 56 L. ed. 721.

Speaking of Lavagnino v. Uhlig, the court said:—

> It is true that there is reasoning to the contrary in Lavagnino v. Uhlig, but in Farrell v. Lockhart, that language was qualified and the older precedents recognized as in full force.

By this somewhat devious route the supreme court of the United States returned to the "older precedents," which remain "unqualified" as a guide to future decision.

All the decisions of the other courts rendered since Brown v. Gurney and Farrell v. Lockhart recognize the binding force of these "precedents."[94]

The application of the principles involved in the cases heretofore discussed may be illustrated by the following hypothetical cases, in which A, B, and C are adverse claimants to the same ground, priorities being in the order named.

First. Where the controversy is confined to A and B, A's claim was subsisting when B made his location. A commences suit to quiet title. B defends on the ground that A failed to perform the annual work for one or more years subsequent to B's location. In this action A must prevail for the obvious reason that his estate has never been forfeited. It was subject to forfeiture and his estate might have been terminated by a relocation made at the proper time. A's failure to perform the work does not inure to the benefit of B, whose location was void at the time it was made.

[94] Swanson v. Kettler, 17 Idaho, 321, 105 Pac. 1059, 1065; Bergquist v. West Virginia & Wyoming C. Co., 18 Wyo. 234, 106 Pac. 673, 683; Street v. Delta M. Co., 42 Mont. 371, 112 Pac. 701, 705; Willison v. Ringwood, 190 Fed. 549, 552, 111 C. C. A. 401; Rooney v. Barnette, 200 Fed. 700, 708.

Second. A applies for patent and B adverses, or B applies for patent and A adverses, the same result follows.

Third. B applies for patent and A fails to adverse. B succeeds in securing a patent not because his location covering a prior claim is valid, but because the question of priority of title is conclusively determined in B's favor.[95] The question of performance or non-performance of annual work is not a question with which the government is concerned in the absence of adverse claims asserted in the patent proceeding.[96] In the absence of such adverse claims the land department must necessarily assume that the title of the applicant is free from surface conflict. It does not determine the date of the location. Its adjudication at the time of the final entry is simply that at that time the applicant has performed all the acts required by law to perfect his location.[97] The circumstances under which B originally made his location are not brought to the attention of the land department.

Fourth. A, B, and C are conflicting locators of the same ground with priorities in the order named. At the time B located, A's location was valid and subsisting, and not subject to relocation. Subsequently A fails to perform the annual work for a given calendar year, after the lapse of which C relocates the claim. In any ordinary action disconnected with the patent proceedings in which A, B and C are arrayed against one another, A would be eliminated, and C would defeat B, for the reason that B's location was invalid

[95] *Post,* § 742.

[96] *Ante,* § 624.

[97] Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 354, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

when made. C's relocation is valid because the ground was then for the first time open to relocation. In other words, B's location was void, not only as against A, but as against all the world.

Fifth. A controversy arises between B and C. B applies for patent, C adverses and A stands aloof. In adverse suits the title of each party is put in issue. C may assail B's title on the ground that when B located the claim the location of A was valid and subsisting, although A is not a party to the controversy. B may rebut this attack by showing an abandonment on the part of A prior to the date of B's location, although A was not in default as to his annual work. In this event the burden of proof is on B to show abandonment by A.[98]

The principles applied in the foregoing illustrations are controlling, however the parties may be arrayed against each other. These principles are those sanctioned by the older as well as by the later precedents.

§ 646. **Forfeiture to co-owners.**—Section twenty-three hundred and twenty-four of the Revised Statutes, after providing for the performance of annual labor or the making of improvements to the value of one hundred dollars during each calendar year, contains the following additional provision:—

> Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements[99] may, at the

[98] Willison v. Ringwood, 190 Fed. 549, 551, 111 C. C. A. 401.

[99] A co-owner who has not made the required expenditures is not within the terms of the statute, and therefore not in a position to take advantage of its forfeiture provisions. If a group of claims is involved in the forfeiture proceedings, he must have expended one hundred dollars for each claim in the group. Golden & Cord M. & M. Co., 31 L. D.

expiration of the year, give such delinquent co-owner personal notice[100] in writing,[1] or notice by publication in the newspaper published nearest the claim,[2] for at least once a week for ninety days,[3] and if at the expiration of ninety days after such notice in writing, or by publication, such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made required expenditures.

As was said by the supreme court of the United States:—

> This statute provides a summary method for the purpose of insuring the proper contribution of co-owners among themselves in the working of the mine, and it provides a means by which a delinquent co-owner may be compelled to contribute his share under the penalty of losing his right and title in the property because of such failure.[4]

In the case of Brundy v. Mayfield, considered by the supreme court of Montana,[5] it was urged that this portion of the federal statute was repugnant to the constitution of the United States, as it was an attempt to deprive persons of property without due process of law. The court did not pass upon the question.

178. Approved and followed in a similar case in an action to erect a trust on patented title. Delmoe v. Long, 35 Mont. 139, 88 Pac. 778, 783.

100 For suggested defects and contents of notice, see Haynes v. Briscoe, 29 Colo. 137, 67 Pac. 156.

1 Service by mail is not sufficient. Haynes v. Briscoe, 29 Colo. 137, 67 Pac. 156.

2 This does not mean "the nearest traveled route." Haynes v. Briscoe, 29 Colo. 137, 67 Pac. 156. See discussion as to this under the patent proceedings, *post*, § 685.

3 As to manner of computing the period of publication, see Elder v. Horseshoe M. Co., 15 S. D. 124, 102 Am. St. Rep. 681, 87 N. W. 586.

4 Elder v. Horseshoe M. & M. Co., 194 U. S. 248, 255, 24 Sup. Ct. Rep. 643, 48 L. ed. 960.

5 15 Mont. 201, 38 Pac. 1067.

The exigencies of the case did not require it. In Van Sice v. Ibex M. Co.[6] the same question was raised and the circuit court of appeals, eighth circuit, held that it was wanting in merit. It was there said that—

> The mineral lands were the property of the government and for the disposal of them it was competent for congress to prescribe such conditions as in its judgment were required by wise public policy. The section of the statute providing for the extinguishment of the interest of a co-owner for his failure to contribute to the work of exploration and development is part of the very law upon which he is compelled to rely for the source of his title, for the existence of any right whatever. He cannot well claim a vested interest freed from the statutory conditions which qualify it. The right and its limitations go together.

The courts, however, hold that the statute is one of forfeiture and should be strictly construed.[7]

In order, therefore, that the interest of a cotenant may be forfeited it is essential—

1. That the relationship of cotenancy exist.

2. That the entire work shall have been performed by one or more of the cotenants.

3. That the delinquent cotenant or his successors in estate has failed to contribute his proportion after service of personal notice or by publication, as required by law.

[6] 173 Fed. 895, 896, 97 C. C. A. 587.

[7] Turner v. Sawyer, 150 U. S. 578, 585, 14 Sup. Ct. Rep. 192, 37 L. ed. 1189, 17 Morr. Min. Rep. 683; McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 593, 50 L. R. A. 184, 19 Morr. Min. Rep. 615; Elder v. Horseshoe M. Co., 15 S. D. 124, 102 Am. St. Rep. 681, 87 N. W. 586; Delmoe v. Long, 35 Mont. 139, 88 Pac. 779, 783; Evalina Gold Mining Co. v. Yosemite M. & M. Co., 15 Cal. App. 714, 115 Pac. 946, 948; Repeater and Other Lodes, 35 L. D. 56.

It is quite obvious that one who does not occupy the status of a cotenant, e. g., a mere lienholder,[8] or the stockholder of a corporation,[9] or the superintendent of a mining company using his own name for that purpose,[10] cannot avail himself of the benefit of the statute. Parties, however, who succeed to the interest of a cotenant who has performed the work, may obtain forfeiture by giving the notice, and otherwise complying with the statute.[11]

Where cotenants convey to a trustee, notices signed by the beneficial owners—the original cotenants—have been held sufficient.[12] Necessarily the work must have been actually done,[13] and there should have existed the necessity for doing it to protect the property. Where performance is not required during any given year, the mere doing of the work for that year will not avail the working cotenant as the basis of forfeiture.[14] One who does assessment work on an association placer mining claim, for which he is paid by one of the part owners, has no right to enforce forfeiture of the interest of another part owner for failure to contribute.[15] The death of the cotenant performing the labor would not deprive his personal repre-

8 Turner v. Sawyer, 150 U. S. 578, 585, 14 Sup. Ct. Rep. 192, 37 L. ed. 1189.

9 Repeater and Other Lode Claims, 35 L. D. 54.

10 Dye v. Crary, 13 N. M. 439, 9 L. R. A., N. S., 1136, 85 Pac. 1038, 1043; affirmed, 208 U. S. 515, 526, 28 Sup. Ct. Rep. 360, 52 L. ed. 595.

11 Badger Gold M. & M. Co. v. Stockton G. & C. M. Co., 139 Fed. 838, 842. In this case the selling cotenant who had performed the work joined in the notice, but the court held that his rights were assignable. See, also, In re Squires, 40 L. D. 542, 545.

12 Van Sice v. Ibex Min. Co., 173 Fed. 895, 897, 97 C. C. A. 587.

13 Delmoe v. Long, 35 Mont. 139, 88 Pac. 779, 782; Golden & Cord Lode Claims, 31 L. D. 178; In re Squires, 40 L. D. 542.

14 Royston v. Miller, 76 Fed. 50, 53, 18 Morr. Min. Rep. 418.

15 Knickerbocker v. Halla, 177 Fed. 172, 174, 100 C. C. A. 634.

sentatives of the right to obtain forfeiture, nor would the death of the delinquent co-owner prevent the proceedings under the statute against the heirs or personal representatives.[16]

The question as to whether the remedy of a working cotenant against a nonparticipating co-owner is exclusive or not was mooted in an opinion rendered by the supreme court of Idaho.[17]

As the law requires the work to be done in order to save the property from forfeiture through relocation, it would seem beyond question that there is an implied contract on the part of each cotenant to reimburse his co-owner for expenditures made by him to protect the property for the common benefit. A partial performance by one co-owner will not save his interest. Representation is a unit,[18] and as one cotenant, in order to protect his interest in the location, may be compelled to expend more than his just share, those associated with him should be compelled to contribute their respective proportions. Failing so to do, the one performing the labor making the required expenditure would have his right of action against the delinquent co-owners.[19] The right of one cotenant to contribution from others for expenditures made in removing a common burden is well settled.[20] But this

[16] Elder v. Horseshoe M. & M. Co., 194 U. S. 248, 254, 24 Sup. Ct. Rep. 643, 48 L. ed. 960. In Billings v. Aspen Min. & S. Co., 51 Fed. 338, 339, 2 C. C. A. 252, the notice was addressed to the deceased or his administrator. It was held void, but in the light of Elder v. Horseshoe M. & M. Co., *supra*, the Billings-Aspen case is no longer authority.

[17] McDaniel v. Moore, 19 Idaho, 43, 112 Pac. 317, 319.

[18] Saunders v. Mackey, 5 Mont. 523, 6 Pac. 361, 362.

[19] Holbrooke v. Harrington, 4 Cal. Unrep. 554, 36 Pac. 365, 366.

[20] Freeman on Cotenancy and Partition, § 322; Harrison v. Cole, 50 Colo. 470, 116 Pac. 1123, 1126; McDaniel v. Moore, 19 Idaho, 43, 112 Pac. 317, 319; Beck v. O'Connor, 21 Mont. 109, 53 Pac. 94, 96,

remedy is *in personam*, and would not enable the working cotenant to secure the interest of the delinquent, except by suit on the implied promise, judgment and sale under execution. If the working cotenant seeks to effectuate a forfeiture, the only method is that outlined in the statute, and this method must be strictly pursued. The proceeding by which the interest of a delinquent co-owner is forfeited to such of his cotenants as perform the work may be said to be in the nature of a proceeding *in rem*, the initial step in such proceeding being the service of a notice upon the delinquent. This service may be personal or by publication. Publication is not required where there is personal service.[21] Where there is personal service and a subsequent publication, the publication is a waiver of the personal service.[22] There is no authority for service by mail.[23]

As to whom the notice should be addressed, there is no specific provision of the statute.[24] A notice addressed to "Rufus Wilsey, his heirs, administrators, and to all whom it may concern," was when published held to be sufficient, although at the time of publication Wilsey was dead and no administrator had been appointed.[25]

citing Prentice v. Janssen, 79 N. Y. 478; Jenkins v. Jenkins (N. J.), 5 Atl. 134, 136; Eads v. Retherford, 114 Ind. 273, 5 Am. St. Rep. 611, 16 N. E. 587, 588. See Oliver v. Lansing, 57 Neb. 352, 77 N. W. 802, 804.

[21] Evalina G. M. Co. v. Yosemite G. M. & M. Co., 15 Cal. App. 714, 115 Pac. 946, 948.

[22] Knickerbocker v. Halla, 177 Fed. 172, 174, 100 C. C. A. 634.

[23] Haynes v. Briscoe, 29 Colo. 137, 67 Pac. 156.

[24] Elder v. Horseshoe M. & M. Co., 9 S. D. 636, 62 Am. St. Rep. 895, 70 N. W. 1060.

[25] Elder v. Horseshoe M. & M. Co., 194 U. S. 248, 254, 24 Sup. Ct. Rep. 643, 48 L. ed. 960, affirming 15 S. D. 124, 102 Am. St. Rep. 681, 87 N. W. 586.

One of the California district courts of appeals, speaking of the addressee of such notice, said:—

> If the notice had been by publication there would be some reason in holding as the cases seem to hold, that in order to bind unknown owners the notice should not only be directed to the ostensible or supposed co-owners, but to their heirs, administrators and assigns. But where the notice is addressed to and personally served upon the only known co-owners it would be idle to further address the notice for there would be no known person upon whom to serve it.[26]

When the notice is to be personally served, such service may be made by anyone, unless the state law provides for service by some officer, as in Oregon, where it must be made by the sheriff.[27]

Personal service on a co-owner binds his grantee under an unrecorded conveyance when such grantee has knowledge of the delinquency.[28]

Where service is to be made by publication, the notice must be published in the newspaper published nearest the claim for at least once a week for ninety days.

As to this publication the supreme court of South Dakota thus expressed its views:—

> We feel justified in the conclusion that congress in adopting the provisions in regard to the disposition to be made of a defaulting co-owner's interest in the claim acted upon the same theory, and the published notice was intended to accomplish the same result as the published notice of application

[26] Evalina Gold M. Co. v. Yosemite G. G. & M. Co., 15 Cal. App. 714, 115 Pac. 946, 948.

[27] Laws 1903, p. 326, § 1; Lord's Laws, §§ 5141, 5151.

[28] Evalina G. M. Co. v. Yosemite G. M. Co., 15 Cal. App. 714, 115 Pac. 946, 948.

for a patent, that is, to cut off all claims of all persons, and vest in the co-owner a clear title to his co-owner's interest without regard to the interest of minors, lienholders or encumbrancers.[28a]

The supreme court of the United States concurred inferentially at least in this view, holding that the proceeding is entirely unlike the publication of summons for the purpose of commencing an action against a particular individual.[29]

As to what is meant by the "newspaper published nearest the claim," it is doubtful if we may rely upon the rule governing publication in the patent proceedings. The statute in that behalf contains a similar requirement, but in such cases the register is called upon to designate the newspaper, and he is allowed some discretion in the matter. This subject is discussed elsewhere.[30] The supreme court of Colorado thinks the analogy of the publication in the patent proceedings does not apply to the forfeiture statute. It held that "nearest the claim" did not mean that the distance should be measured by the nearest traveled route.[31] The air-line distance would seem to meet the requirement.

With reference to the period of publication,

the phrase "for at least one week for ninety days" should be rendered "at least once a week during ninety days," that is to say, there shall be at least one publication in each week during the prescribed period. In other words, notice shall continue ninety days and one publication each week constitutes the

28a Elder v. Horseshoe M. & M. Co., 9 S. D. 636, 62 Am. St. Rep. 895, 70 N. W. 1060, 1063.

29 Elder v. Horseshoe M. & M. Co., 194 U. S. 248, 254, 24 Sup. Ct. Rep. 643, 48 L. ed. 960.

30 *Post*, § 685.

31 Haynes v. Briscoe, 29 Colo. 137, 67 Pac. 156, 157.

notice required. Necessarily the 90-day period begins with the first publication.[32]

Necessarily, in cases where the forfeiture proceedings are invoked, the burden of proof rests upon the party claiming the benefit of such forfeiture.[33]

As a rule, the state laws provide for making a record of the various steps culminating in the forfeiture, making certain affidavits *prima facie* evidence of the facts and supplying something in the nature of a record chain of title. Such affidavits are required by departmental regulation in patent proceedings.[34]

The states of Arizona,[35] California,[36] Nevada,[37] and Oregon[38] have enacted laws supplementary to the federal statute, the provisions of which laws must also be complied with, as such laws are recognized to be within the power of the state. The fundamental requirements of the federal law must of course be observed, permissive local state legislation being limited to matters of detail.

The land department originally followed the rule that where one of several co-owners applies for a patent, and in doing so excludes his cotenant, the latter could only protect himself by proceedings to determine an adverse claim, under section twenty-three hundred and twenty-six of the Revised Statutes, and

32 Elder v. Horseshoe M. & M. Co., 15 S. D. 124, 102 Am. St. Rep. 681, 87 N. W. 586; affirmed, 194 U. S. 248, 256, 24 Sup. Ct. Rep. 643, 48 L. ed. 960.

33 Haynes v. Briscoe, 29 Colo. 137, 67 Pac. 156, 157.

34 Par. 15, Mining Regulations, Appendix.

35 Laws 1891, p. 103, § 11; Rev. Stats. 1901, §§ 3245–3249.

36 Civ. Code, § 1426a.

37 Laws 1897, p. 103, § 11; Comp. Laws Nev. 1900, § 218; Rev. Laws 1912, § 2432.

38 Laws 1903, p. 327; Lord's Or. Laws, §§ 5142–5150.

that the department was not called upon to protect the equities of such excluded co-owner.[39]

But it now concedes the rule to be, that ordinarily the excluded co-owner is not required to adverse the patent application, and it therefore allows him the right to protest against the issuance of the patent.[40] In one instance it gave to the patent applicant who had disregarded his cotenant's rights the choice of two methods of doing equity,—either to consent to the insertion of the name of his omitted cotenant in the patent or to have his patent application canceled.[41] But a co-owner who has been omitted from an application for patent to a mining claim cannot by subsequent recourse to forfeiture proceedings against the applicant co-owner acquire any rights in himself to make entry under the co-owner's application. The interest of a co-owner in a mining claim which may be acquired under the forfeiture provisions of the statute is the share or interest of such co-owner in the purely possessory rights, and not in any rights under an application for patent.[42]

A cotenant excluded from a patent application *may* adverse, and perhaps, under certain circumstances, where the claim is held in open hostility and there is an emphatic and well-recognized repudiation of his title brought to his notice, his asserted title may be jeopardized by failure to adverse;[43] or he *may* protest —a privilege granted by departmental regulations.[44]

[39] Grampian Lode, 1 L. D. 544; Hussey Lode, 5 L. D. 93; Monitor Lode, 18 L. D. 358.

[40] Par. 53, Mining Regulations, Appendix. See § 728, *post.*

[41] Golden & Cord Lode Mining Claims, 31 L. D. 178.

[42] Surprise Fraction and Other Lodes, 32 L. D. 93.

[43] Judge Elliott's concurring opinion in Tabor v. Sullivan, 12 Colo. 136, 151, 20 Pac. 437, 441.

[44] Surprise Fraction and Other Lodes, 32 L. D. 93.

But ordinarily he is not compelled to either adverse or protest. If he has been wrongfully excluded, he may have a trust declared at any time after the issuance of the patent.[45] The regulations of the land department do not in this class of cases oust the jurisdiction of the courts.[46] Should the omitted cotenant adverse, the land department will suspend the patent proceeding,[47] to abide the event of the adverse suit.

It is not our purpose to consider here the relative rights, duties, and obligations existing between tenants in common of mining claims. We have heretofore discussed the subject of relocation by one cotenant in hostility to the others,[48] and in future chapters will have occasion to consider the general subject of mining partnerships and cotenancy.

The object of this section is simply to invite attention to that portion of the federal law which purports to sanction a forfeiture for the benefit of a co-owner. All courts agree that the statute must be strictly construed. While it may be true, as a general rule, that a court of equity will not aid in enforcing a forfeiture, yet the rule is not inflexible.

[45] Turner v. Sawyer, 150 U. S. 578, 586, 14 Sup. Ct. Rep. 192, 37 L. ed. 1189, 17 Morr. Min. Rep. 683; Sussenbach v. First Nat. Bank, 5 N. D. 477, 41 N. W. 662; Brundy v. Mayfield, 15 Mont. 201, 38 Pac. 1067, 1070; Malaby v. Rice, 15 Colo. App. 364, 62 Pac. 228; Ballard v. Golob, 34 Colo. 417, 83 Pac. 376; Stephens v. Golob, 34 Colo. 429, 83 Pac. 381; Lockhart v. Leeds, 195 U. S. 427, 25 Sup. Ct. Rep. 76, 49 L. ed. 263.

[46] Turner v. Sawyer, 150 U. S. 578, 588, 14 Sup. Ct. Rep. 192, 37 L. ed. 1189, 17 Morr. Min. Rep. 683; Malaby v. Rice, 15 Colo. App. 364, 62 Pac. 228.

[47] Thomas v. Elling, 25 L. D. 495; S. C., on review, 26 L. D. 220.

[48] *Ante*, § 406.

The rule is that forfeiture will be enforced in a court of equity when such relief accords more with the principles of right and justice than would the denial thereof.[49]

Article II. Resumption of Work.

§ 651. Resumption of work prevents forfeiture.
§ 652. What constitutes a valid resumption of work.
§ 653. When right to resume work must be exercised.
§ 654. Conclusions.

§ 651. Resumption of work prevents forfeiture.—A forfeiture does not ensue from the mere failure to comply with the law.[50] It requires the intervention of a third party and a relocation of the ground before any forfeiture can arise.[51] When thereby such forfeiture becomes effectual, the estate of the original locator is hopelessly lost, and there is no possibility of its being restored.

The statute provides that,—

> Upon a failure to comply with these conditions, the claim or mine upon which such failure occurs shall be open to relocation in the same manner as if no location of the same had ever been made; *pro-*

[49] Van Sice v. Ibex M. Co., 173 Fed. 895, 897, 97 C. C. A. 587. In this case, after the completion of forfeiture proceedings, a dormant application for patent was resurrected and carried to a successful termination in the names of such owners, including that of the forfeited interest. It was held that notwithstanding the subsequent issuance of the patent, the owner who was advertised out acquired nothing under the patent.

[50] An exception to this rule is noted in Alaska, where a failure to perform the necessary work terminates the estate without the intervention of a relocator. Thatcher v. Brown, 190 Fed. 708, 711, 111 C. C. A. 436.

[51] *Ante*, §§ 643, 645.

vided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.[52]

Resumption of work at any time prior to the lawful inception of an intervening right *prevents* forfeiture.[53] It does not restore a lost estate.[54]

In the case of Justice Mining Co. v. Barclay,[55] Judge Hawley expressed the view that where relocations have been made after the owner of the original location has failed beyond the statutory time to do the

[52] Rev. Stats., § 2324; 18 Stats. 315; Comp. Stats. 1901, p. 1427; 5 Fed. Stats. Ann. 19.

[53] Belk v. Meagher, 104 U. S. 279, 282, 26 L. ed. 735, 1 Morr. Min. Rep. 510; Pharis v. Muldoon, 75 Cal. 284, 17 Pac. 70, 71, 15 Morr. Min. Rep. 348; Belcher v. Defarrari, 62 Cal. 160, 163; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652, 15 Morr. Min. Rep. 329; Belk v. Meagher, 3 Mont. 65, 1 Morr. Min. Rep. 522; Gonu v. Russell, 3 Mont. 358; Honaker v. Martin, 11 Mont. 91, 27 Pac. 397; Lacey v. Woodward, 5 N. M. 583, 25 Pac. 784, 785; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 314, 1 Fed. 522, 536, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 115, 11 Fed. 666, 681, 4 Morr. Min. Rep. 411; Lakin v. Sierra Buttes M. Co., 11 Saw. 231, 241, 25 Fed. 337, 343; Little Gunnell M. Co. v. Kimber, 1 Morr. Min. Rep. 536, Fed. Cas. No. 8402; Oscamp v. Crystal River M. Co., 58 Fed. 293, 295, 7 C. C. A. 233, 17 Morr. Min. Rep. 651; Anderson v. Byam, 8 L. D. 388; Justice M. Co. v. Barclay, 82 Fed. 554, 559; Jordan v. Duke, 6 Ariz. 55, 53 Pac. 197; Klopenstine v. Hays, 20 Utah, 45, 57 Pac. 712, 714; Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036, 1038, 21 Morr. Min. Rep. 470; S. C., in error *sub nom.*, Yosemite M. Co. v. Emerson, 208 U. S. 25, 28 Sup. Ct. Rep. 196, 52 L. ed. 374; Crown Point G. M. Co. v. Crismon, 39 Or. 364, 65 Pac. 87, 88, 21 Morr. Min. Rep. 406; Buffalo Z. & C. Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572, 576, 22 Morr. Min. Rep. 276; Little Dorrit G. M. Co. v. Arapahoe G. M. Co., 30 Colo. 431, 71 Pac. 389, 391; Field v. Tanner, 32 Colo. 278, 75 Pac. 916, 919; Thornton v. Kaufman, 40 Mont. 282, 135 Am. St. Rep. 618, 106 Pac. 361, 362; Peachy v. Gaddis (Ariz.), 127 Pac. 739, 742.

[54] Knutson v. Fredlund, 56 Wash. 634, 106 Pac. 200, 202. This rule does not apply in Alaska. Thatcher v. Brown, 190 Fed. 708, 711, 111 C. C. A. 436.

[55] 82 Fed. 554.

necessary assessment work, but such relocations are afterward abandoned, and thereafter the owner of the original location performs assessment work *which revives his rights*, the fact of such intermediate relocations cannot aid one who subsequently attempts to relocate the same ground. These views were quoted with approval by the supreme court of Utah.[56] This is not altogether consistent with the theory that after a valid relocation has once been made the rights of the original locator have been completely lost. Yet the effect given to the relocation under the statute is that of an original location,—the same "as if no location of the same had ever been made." If after intervening valid relocations are made, and become subject to forfeiture, the original owner may, by simply resuming work, reinstate his original *status*, his original estate must have simply been in suspense during the period when the ground was covered by valid relocations. It seems to us that the new entry of the relocator terminates the estate of the original locator, and in turn the estate of the relocator can only be divested by a new entry and a new location. This is in consonance with the rule discussed in a previous section,[57] as between junior and senior conflicting locations.

§ 652. What constitutes a valid resumption of work. With the doctrine established, that all forfeitures are odious, and that one seeking to avail himself of the failure of a preceding locator to comply with the law, in order to secure a relocation of the ground, must establish such failure by clear and convincing proof,[58]

[56] Klopenstine v. Hays, 20 Utah, 45, 57 Pac. 712, 714.

[57] § 645a.

[58] *Ante*, § 645.

it is natural that the courts should lean toward a liberal construction of the law of resumption. In order that we may be able to intelligently deduce a correct rule from the decisions, it is necessary for us to briefly consider the leading cases and the facts surrounding them. For illustrative purposes, in epitomizing these cases, let us assume that in all of them the original locator and alleged delinquent is represented by "A" and the relocator by "B." This will avoid confusion and more readily exhibit the analogies or differences.

Case 1.—A, owning two claims, performed on the two during the year 1880 only one hundred dollars' worth of work; that is, fifty dollars upon each. His claims were subject to relocation on January 1, 1881. During January of that year he performed work that was actual and valuable, to the extent of twenty-four dollars on the two claims, or twelve dollars each. No other or further work was performed. B entered and located in August, 1881. It was held that the work done by A in January constituted a sufficient resumption; B's relocation was therefore void.

In affirming a judgment in A's favor the supreme court of California said:—

> It is not necessary to decide that an attempt to assert a continuous right may be based upon a pretense of work so plainly a sham as that it will be disregarded; but here the work done was actual and valuable. The letter of the statute upholds the view as to the resumption of work taken by the court below, and forfeitures and denouncements are not to be favored by basing them upon language which does not plainly and unmistakably provide for them.[59]

[59] Belcher v. Deferrari, 62 Cal. 160, 163.

Mr. Morrison says of this case, "Such a decision is only trifling with the law and the rights of parties based upon the law."[60]

The supreme court of Montana quotes this approvingly, and adds the further comment:—

> The result of the holding in Mining Co. v. Deferrari, *supra*, is to defeat the real objects of the statute, which are the exploration and development of mining claims. Every person who continues in possession of such property upon the public domain of the United States without performing annually the labor that has been specified, violates the conditions of the grant from the government. The resumption of work by the original locator, whose rights are subject to forfeiture without the expenditure, with reasonable diligence, during the year, of the sum of one hundred dollars for labor or improvements upon the mine, is an evasion of the statute.[61]

The latest exposition of the law by the supreme court of California will be found stated under Case 3, *post*.

Case 2.—A located the claim in controversy on July 10, 1884. Prior to January 1, 1886, he performed labor to the aggregate value of sixty dollars only, the last work having been done on December 24, 1885. On January 1, 1886, at 1 o'clock in the morning, B entered and posted a notice of relocation. On January 1st and 2d, A performed labor of the value of ten dollars, and quit. On January 5th, B marked the boundaries of his relocation, and otherwise complied with the law. Thereafter both A and B performed the annual work.

The supreme court of California held[62] that the relocation not having been completed until January 5th,

60 Morr. Min. Rights, 14th ed., p. 126.

61 Honaker v. Martin, 11 Mont. 91, 97, 27 Pac. 397, 398.

62 Pharis v. Muldoon, 75 Cal. 284, 17 Pac. 70, 71, 15 Morr. Min. Rep. 348.

it was void, as in the meanwhile A had resumed work, citing Case 1, *supra*. In addition to this, the court intimated that B was a moral delinquent, because he entered by stealth at an unusual hour. That the relocation was made at an unusual hour from a professional standpoint is quite true. It is also true that this hour is the fashionable one for *resuming* work and making relocations in mining camps. There is nothing in the record justifying the suggestion that B's entry was by stealth.

Case 2a.—A located the claim in controversy January 1, 1898. On December 26, 1899, he commenced to do the assessment work and continued until December 30, 1899 (Saturday evening), when he quit work, leaving his tools on the ground intending to resume work the following Monday, which he did, and thereafter prosecuted it diligently until more than the legal requirements were satisfied. B entered and relocated a few moments after midnight December 31, 1899. *Held*, by a majority of the court, Sanborn, J., vigorously dissenting, that A's acts constituted a valid resumption and B's relocation was void.[63]

Case 3.—A located two claims in 1885. He did practically no work until January, 1893, when he worked about three hours upon each claim on one day, and on the next sunk a shaft about six feet deep on one of them. This was all. The supreme court of California upheld as correct the following instructions to the jury:[64]—

[63] Fee v. Durham, 121 Fed. 468, 57 C. C. A. 584, citing and following the two California cases 1 and 2, *supra*. Willitt v. Baker, 133 Fed. 937, is a similar case and follows Fee v. Durham.

[64] McCormick v. Baldwin, 104 Cal. 227, 228, 37 Pac. 903, 904.

> A party cannot hold a mining claim for several years without doing in any year the work required, by simply going on it at the beginning of each year and doing a few hours' work, with no *bona fide* intent to comply with the statutory requirement as to the amount of work to be done. . . . . It is against the policy of the law, and a fraud against the government and the law, to hold quartz claims by merely doing a few dollars' worth of work thereon at or near the beginning of the year next following the year on which claimant failed to do the necessary work, when such work is not commenced with the *bona fide* intention of being continued till the full amount is done. Such labor so done is a mere pretense and a sham, and will not prevent the relocation for want of necessary work.

The court makes no reference to its previous decisions in either Case 1 or 2, *supra*.

Case 4.—A, to avoid a forfeiture for failure to perform work he should have done in 1887, relocated the claim January 1, 1888. In December, 1889, he made a contract with a third party to represent the mine for 1889. The employee labored from December 22, 1889, to January 12, 1890, and received from A one hundred dollars. The value of this labor, estimated by the laborer, was about fifty dollars. Logs, slabs, and lumber, of the value of sixty-three dollars, were conveyed to the premises, but never used. Mining implements were brought there, used slightly, and carried away. B relocated the claim April 25, 1890. A claimed that the ground was not subject to relocation, as he had resumed work.

The supreme court of Montana, in reversing a judgment in favor of A, held that when an original locator avails himself of the statutory privilege of resuming work to preserve his estate from forfeiture, he must

prosecute the same with reasonable diligence until the requirement for the annual labor and improvements had been obeyed.[65]

The same tribunal reannounced this doctrine in later cases.[66]

Case 5.—A located in 1864, and the location was valid and subsisting when the act of May 10, 1872, was passed. No work was performed, however, after that date until June, 1875, when A resumed work upon the claims and *did enough to re-establish his original rights.* B attempted to relocate on December 19, 1876. It was held that A's resumption protected the claim from relocation until January 1, 1877. There could be no forfeiture until that date. B's relocation was therefore void, and did not take effect on January 1, 1877, although A failed to perform any work during the year 1876.[67]

Case 6.—A located a claim January, 1882. On December 31, 1883, not having theretofore performed his assessment work, he went on the ground and was making preparations to resume work, when on January 1, 1884, B entered and relocated the claim. A remained in possession for about six days, and did work thereon to the amount of about sixty dollars, when he quit and went away. It was held that B's relocation was premature.[68]

[65] Honaker v. Martin, 11 Mont. 91, 98, 27 Pac. 397, 398; cited in Bishop v. Baisley, 28 Or. 119, 41 Pac. 936, 938.

[66] Hirschler v. McKendricks, 16 Mont. 211, 40 Pac. 290; McKay v. McDougall, 25 Mont. 258, 87 Am. St. Rep. 395, 64 Pac. 669.

[67] Belk v. Meagher, 3 Mont. 65, 1 Morr. Min. Rep. 522; S. C., on appeal, 104 U. S. 279, 26 L. ed. 735, 1 Morr. Min. Rep. 510. See, *ante,* § 218.

[68] Jordan v. Duke, 6 Ariz. 55, 53 Pac. 197, 201.

Case 7.—A located a claim in 1896, and performed the work for 1897. On December 30, 1898, he went on the claim and worked that and the following day. January 1, 1899, was Sunday. On this day he rested, resuming work again January 2d, and continuing thenceforward until January 25th, completing the full amount required to be done. B went on the ground in the afternoon of December 31st, and saw no one at work or evidence of work being done. He returned to the claim about midnight, and shortly after, on January 1st (Sunday), relocated the claim. It was held that A's resumption was valid, and the relocation void.[69]

§ 653. When right to resume work must be exercised.—We have heretofore[70] discussed the rulings of the courts of last resort upon the subject of relocation of claims subject to forfeiture, and have adopted the view announced by Judge Hallett, that the right of the original locator to resume work and prevent forfeiture lapses, unless such right is exercised before another has taken possession of the property with intent to relocate it. The first step lawfully taken by a relocator after a claim becomes subject to forfeiture will protect him for the period of time fixed by law within which he is called upon to perfect his relocation. An intermediate resumption by the delinquent original locator cannot cut off this privilege. We have endeavored to present this phase of the law fully in the section referred to.

[69] Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036, 1038, 21 Morr. Min. Rep. 470; S. C., in error *sub nom.*, Yosemite M. Co. v. Emerson, 208 U. S. 25, 31, 28 Sup. Ct. Rep. 196, 52 L. ed. 374. This is substantially the same as Case 2a, *supra*.

[70] *Ante*, § 408.

As there noted, the supreme court of Montana does not agree with the foregoing deductions, but is of the opinion that a resumption at any time prior to the completion of the relocation will defeat the relocation.

§ 654. Conclusions.—We are justified in deducing the following conclusions:—

(1) In order to prevent a forfeiture for failure to perform the assessment work required by law, the claimant must resume work in good faith, and prosecute the same continuously and without unreasonable interruption until the full amount of labor is performed,—that is, one year's delinquency must be made up. It is not necessary that work should be done for every year that the claim was idle.[71] Nothing less than the outward manifestation of an intent to atone for the delinquency by a diligent and continuous prosecution of substantial and valuable development work will satisfy the law; that while the claim will be protected from relocation so long as the claimant is actually engaged in making up the deficiencies, a suspension of work for any appreciable period before the full amount required has been performed will subject the claim to relocation.

(2) The right to resume work is lost where a qualified relocator enters and initiates a relocation. A resumption between the initiatory and final acts of relocation will not avail.[72]

[71] Crown Point G. M. Co. v. Crismon, 39 Or. 364, 65 Pac. 87, 88, 21 Morr. Min. Rep. 406; Temescal Oil M. & D. Co. v. Salcido, 137 Cal. 211, 69 Pac. 1010, 1011, 22 Morr. Min. Rep. 360. Principle applied in Field v. Tanner, 32 Colo. 278, 75 Pac. 916.

[72] See discussion, *ante*, § 408.

TITLE VII.

OF THE PROCEEDINGS TO OBTAIN UNITED STATES PATENT, AND THE TITLE CONVEYED BY THAT INSTRUMENT.

CHAPTER

I. THE LAND DEPARTMENT AND ITS FUNCTIONS.

II. THE SURVEY FOR PATENT.

III. THE APPLICATION FOR PATENT AND PROCEEDINGS THEREON.

IV. THE ADVERSE CLAIM.

V. ACTIONS TO DETERMINE ADVERSE CLAIMS, AND THE EFFECT OF JUDGMENT THEREON.

VI. THE CERTIFICATE OF PURCHASE, AND TITLE CONVEYED THEREBY.

VII. THE PATENT.

CHAPTER I.

THE LAND DEPARTMENT AND ITS FUNCTIONS.

§ 658. Introductory.
§ 659. The land department—How constituted.
§ 660. Registers and receivers—Their appointment, powers, and duties.
§ 661. The surveyors-general and their deputies.
§ 662. Commissioner of the general land office — Appointment, powers and duties.
§ 663. Secretary of the interior.
§ 664. Jurisdiction of the land department.
§ 665. The effect of the decisions of the land department upon questions of fact.
§ 666. Decisions of the land department upon questions of law and mixed questions of law and fact.

§ 658. Introductory.—As an appropriate introduction to a discussion of the proceedings necessary to obtain the ultimate title to a mining claim by the issuance of a United States patent, as well as for the purpose of determining the force and effect of such patent when issued, it is advisable to consider in brief outline the nature of the tribunal charged with the duty of administering the public land laws, the functions of such tribunal, and the scope of its jurisdiction. While in doing so we may reach beyond the legitimate scope of this treatise, yet, considering the relationship existing between the department and the courts which at times are called upon to construe its rulings and judgments, and in certain phases of the mining laws are supposed to perform certain auxiliary functions, we deem it important that the subject should be briefly presented.

§ 659. The land department—How constituted.—What is now known as the general land office was originally a bureau of the treasury department, under the law of April 25, 1812; but upon the creation of the de-

partment of the interior,[1] the land office was transferred to that department, which has ever since supervised the sale and disposal of public lands.

It consists of the secretary of the interior, the commissioner of the general land office, and their subordinates, and as thus constituted is a special tribunal, vested with certain judicial powers to hear and determine claims to the public lands, and with authority to execute its judgments by conveyances to the parties entitled to them.[2] Courts may not anticipate its action or take upon themselves the administration of the land grants of the United States.[3]

The subordinate officers of the department intimately associated with the administration of the public land system are, the registers and receivers, surveyors-general and their deputies.

§ 660. Registers and receivers—Their appointment, powers, and duties.—Registers and receivers are appointed by the president, with the advice and consent of the senate, to hold office for four years. They are required to reside at the place where the land office to which they are appointed is located, and to execute a bond before entering upon their office.[4]

They are empowered in the first instance to pass upon all claims relating to lands within their districts,[5]

1 March 3, 1849, 9 Stats. at Large, p. 395.

2 United States v. Winona & St. Paul R. R., 67 Fed. 948, 955, 15 C. C. A. 96; Germania Iron Co. v. James, 89 Fed. 811, 813, 32 C. C. A. 348; James v. Germania Iron Co., 107 Fed. 597, 600, 46 C. C. A. 476; King v. McAndrews, 111 Fed. 860, 863, 50 C. C. A. 29; United States v. Northern Pac. Ry. Co., 95 Fed. 864, 870, 37 C. C. A. 290.

3 Oregon v. Hitchcock, 202 U. S. 60, 70, 26 Sup. Ct. Rep. 568, 50 L. ed. 935.

4 Rev. Stats., §§ 2234, 2237; 30 Stat. 234; Comp. Stats. 1901, p. 1366; 6 Fed. Stats. Ann. 227, 229.

5 Potter v. United States, 107 U. S. 126, 129, 1 Sup. Ct. Rep. 524, 27 L. ed. 330; Wilcox v. Jackson, 13 Pet. 498, 511, 10 L. ed. 264.

except where mineral applications are adversed, in which event the question of conflicting claims is referred to the courts, and in case of a few other filings, such as forest, lieu, Sioux, half-breed and other forms of scrip.[6]

The measure of their authority is the acts of congress and such regulations of the general land office as may have been made in pursuance of law. They have no powers except such as are derived from these sources.[7]

Their acts are subject to the supervision and control of the commissioner of the general land office, whether the matter is brought to his attention by appeal or otherwise.[8] Their conclusions are at best but advisory.[9]

They are required to exercise a judicial judgment and discretion, and their action relating to the disposal of public lands will not be interfered with by *mandamus* or injunction.[10]

Although each land office to be legally constituted and authorized to do business must have a register and receiver, they need not act jointly in administering oaths or taking testimony.[11]

In passing upon the sufficiency of proofs, they are not required to act concurrently, all that the law requires being that they shall both be satisfied.[12]

[6] Rev. Stats., § 2326; 17 Stat. 93; Comp. Stats. 1901, p. 1431; 5 Fed. Stats. Ann. 35.

[7] Parker v. Duff, 47 Cal. 554, 561.

[8] Rev. Stats., § 2273; Hosmer v. Wallace, 47 Cal. 461, 471; Barnard v. Ashley, 18 How. 43, 45, 15 L. ed. 286; Haydel v. Dufresne, 17 How. 22, 29, 15 L. ed. 115.

[9] Lawrence v. Potter, 22 Wash. 32, 60 Pac. 147.

[10] Litchfield v. Register and Receiver, 1 Woolw. 299, Fed. Cas. No. 8388; Mississippi v. Johnson, 4 Wall. 475, 498, 18 L. ed. 440; Kochler v. Barin, 25 Fed. 161, 166.

[11] Peters v. United States, 2 Okl. 116, 33 Pac. 1031, 1037.

[12] Potter v. United States, 107 U. S. 126, 129, 1 Sup. Ct. Rep. 524,

Strictly speaking, the local land office is not a place of record. Plats of approved surveys of the public lands are deposited there, and tract-books are kept in which are noted the various transactions concerning lands within the district. These records are open to inspection on the part of the public, subject only to the restriction that such examination shall not interfere with the orderly dispatch of public business.[13] Where application is made to enter any particular tract or part of a tract of surveyed lands, the *status* of the land as to antecedent applications or filings is ascertained from an inspection of these books, and the judgment of the local officers in accepting or refusing a filing or application is based upon the condition of the land as shown by these notations.[14]

The local officers are clothed with limited powers. They can issue subpoenas for the attendance of witnesses, but power to punish for refusal to appear and testify is vested in the district courts of the United States.[14a]

Testimony taken before them is reduced to writing and transmitted with their rulings to the commissioner of the general land office. They receive all testimony offered, and while ruling nominally on objections made as to relevancy, competency, or materiality, no evidence is excluded as the result of an adverse ruling except such as is obviously irrelevant. The practice

27 L. ed. 330; Lytle v. Arkansas, 9 How. 314, 320, 13 L. ed. 153; Smith v. United States, 170 U. S. 372, 377, 18 Sup. Ct. Rep. 626, 42 L. ed. 1074.

[13] Secretary's Instructions, 27 L. D. 625; James v. Germania Iron Co., 107 Fed. 597, 604, 46 C. C. A. 476.

[14] Germania Iron Co. v. James, 89 Fed. 811, 815, 32 C. C. A. 348; James v. Germania Iron Co., 107 Fed. 597, 604, 46 C. C. A. 476.

[14a] 33 Stats. at Large, 186, Act of April 19, 1904, ch. 1398.

before these officers is governed by rules and regulations prescribed by the general land office.[15]

Their decisions, being subject to review by the commissioner of the general land office, are not final and conclusive,[16] although they may become so by failure to appeal within the time prescribed by the rules.[17]

All papers filed in proceedings had before them are transmitted to the general land office, where they remain permanently.

Where registers or receivers are disqualified from acting by reason of consanguinity or other cause, such disqualification is absolute and cannot be waived by the parties,[17a] and the commissioner of the general land office has full power to designate proper officers to preside in their stead.[17b]

§ 661. The surveyors-general and their deputies.— The surveyors-general are appointed by the president for the respective surveying districts. They have charge of the public surveys in subordination to the commissioner of the general land office, and exercise a direct supervision over the surveys of mineral lands. They have the appointment of deputy mineral surveyors at their discretion,[18] but all appointments must be

[15] See "Rules of Practice," issued in pamphlet form by the department, and 39 L. D. 395.

[16] Barnard v. Ashley, 18 How. 43, 44, 15 L. ed. 285; Rush v. Valentine, 12 Neb. 513, 11 N. W. 746; Johnson v. Townsley, 13 Wall. 72, 82, 20 L. ed. 485; Kern Oil Co. v. Clarke (on review), 31 L. D. 288.

[17] United States v. Marshall S. M. Co., 129 U. S. 579, 587, 9 Sup. Ct. Rep. 343, 32 L. ed. 734, 16 Morr. Min. Rep. 205; Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240, 242; Craig v. Leitensdorfer, 123 U. S. 189, 205, 8 Sup. Ct. Rep. 85, 30 L. ed. 114.

[17a] Runyan v. Spurgin, 41 L. D. 392.

[17b] George W. Dally, 41 L. D. 295; Act of Jan. 11, 1894, 28 Stats. at Large, 26.

[18] In re Jacobs, 21 L. D. 379. This discretionary power will not be interfered with by the land department unless good cause is shown. In

submitted to the commissioner of the general land office for approval,[19] and their action in suspending or revoking appointments of deputies is subject to review by the general land office.[20]

The appointment is for no fixed period, and where made "during the pleasure of the surveyor-general" it is not terminated by failure to renew the deputy's bond.[21]

The primary obligation of a deputy is contractual and is to the claimant for whom his services are rendered. The surveyor-general exercises supervisory authority in the technical execution of the survey, and maximum charges for the service may be fixed by the commissioner of the general land office.

The deputies are assigned to make mineral surveys upon the nomination of the applicant who makes a private contract with the deputy, which is no concern of the government. The government has no authority to compel a deputy who is in default or delinquent or his bondsmen to do the work, but his appointment as a deputy may be revoked for incompetence or neglect. In such cases the claimant must apply for an amended survey and make provision for its execution.[22]

The field of action of these deputies is confined to the surveying of mining claims and to matters incident thereto. Their work must be done in conformity to regulations prescribed by the surveyor-general. They are required to take an oath and to execute a bond to

re Brown, 27 L. D. 582; In re Kennedy, 38 L. D. 289. See Amendment to Regulations, 40 L. D. 215.

[19] In re Contzen, 38 L. D. 346. See, also, Min. Reg., pars. 116–119, 37 L. D. 497, also in Appendix.

[20] In re Gorlinski, 20 L. D. 283.

[21] In re Powel, 39 L. D. 177; In re Hopkins, 40 L. D. 318.

[22] Golden Rule Co., 37 L. D. 95.

the United States, as are many public officers. Within the limits of their authority they act in the stead of the surveyor-general and under his direction, and in that sense are his deputies. The work which they do is the work of the government and the surveys which they make are its surveys. The right performance of their duties is of real concern not only to those at whose solicitation they act, but also to the owners of adjacent and conflicting claims and to the government.[23]

The field work of the deputies is returned to the surveyor-general, who must approve the surveys before they can be utilized as the basis of patent applications. The bond required of deputy mineral surveyors is the sum of ten thousand dollars, to be approved by the commissioner of the general land office.[24] They may hold a commission in more than one state,[25] but are not permitted to make mineral surveys within a district for which they hold no commission. They are officers of the land department, and as such are strictly under the highest obligations to perform their duties in accordance with instructions. Being such officers, their reports and acts must be accepted as *prima facie* true.[26] They are not permitted to act in the double capacity of surveyors and attorneys for mineral applicants at the same time.[27]

The land department at one time held that they were not prohibited from making mineral entries within the

23 Waskey v. Hammer, 223 U. S. 85, 92, 32 Sup. Ct. Rep. 187, 56 L. ed. 359.

24 In re Hopkins, 40 L. D. 318. See, also, 40 L. D. 215.

25 In re Helmick, 20 L. D. 163.

26 Gowdy v. Kismet G. M. Co., 24 L. D. 191.

27 Min. Reg., par. 128, Appendix.

district for which they are appointed.[28] By subsequent rulings it has been determined that they come within the inhibition of section four hundred and fifty-two of the Revised Statutes, and are prohibited from entering or becoming interested in any of the public lands of the United States,[29] upon penalty of forfeiture of their official position.[30]

Aside from the questions arising by virtue of the relation existing between deputy mineral surveyors and the land department, and the inhibition against their becoming interested in unpatented mining claims or other public land under penalty of forfeiture of their official positions, the status of mining claims where deputy mineral surveyors are locators has long been a mooted question, with decisions of the state and lower federal courts divided as to the result.[31]

28 Lock Lode, 6 L. D. 105.

29 In re Neill, 24 L. D. 393; Floyd v. Montgomery, 26 L. D. 122, 136; In re Maxwell, 29 L. D. 76; In re Baltzell, 29 L. D. 333.

30 In re Bradford, 36 L. D. 61; In re Contzen, 37 L. D. 497, 38 L. D. 346; In re Powel, 39 L. D. 177. See, also, par. 128, Min. Reg. The decision of In re Leffingwell, 30 L. D. 139, had the tendency to suggest that deputies might, under certain circumstances, enter public lands, but subsequently the department referred to the Leffingwell case as special and peculiar, and held that under existing regulations the procedure then permitted would not be allowable. In re Bradford, 36 L. D. 61, 64. The department has even gone so far as to revoke the appointment of a deputy who became the owner of stock in a corporation which was the record claimant of unpatented mining claims and who actively promoted the sale of town lots into which the placer claims were subdivided. The department held that he occupied a position inconsistent with his duties and with the spirit of the mining regulations, even though he did not himself survey the claims for patent. In re Saunders, 40 L. D. 217.

31 Lavagnino v. Uhlig, 26 Utah, 1, 98 Am. St. Rep. 808, 71 Pac. 1046, 1048, 22 Morr. Min. Rep. 610, and Waskey v. Hammer, 170 Fed. 31, 35, 95 C. C. A. 305 (affirmed 223 U. S. 85, 32 Sup. Ct. Rep. 187, 56 L. ed. 359), both held that such locations were void. Hand v. Cook, 29 Nev. 518, 92 Pac. 3, 4, held by a divided court that a deputy

This question has recently been finally determined, however, by the United States supreme court in the case of Waskey v. Hammer.[32]

The facts of this case showed that one Whittren located a placer claim of excessive area. Upon ascertaining the fact, he drew in two of the boundary lines sufficiently to exclude the excess, and in doing so left his only discovery point outside of the readjusted lines, though he later made a new discovery of placer gold within the lines as readjusted. Subsequent to the date of the original location, and prior to the readjustment of area and date of the new discovery, he became a United States deputy mineral surveyor. The court held that he came within the prohibition of section 452, Revised Statutes, and was at the date of his new discovery disqualified to make a location by reason of his having become a United States mineral surveyor; that there was in the section no language confining the penalty to dismissal; and that the readjusted location was void.[33]

The authority for making a mineral survey is a special order issued by the surveyor-general upon the application of the claimant, who is permitted to select the deputy. In making the survey the deputy is governed by the "Manual of Instructions," emanating from the general land office.

mineral surveyor was not disqualified to make locations. See concurring opinion of Talbot, J., in Gibson v. Hjul, 32 Nev. 360, 108 Pac. 759, 763.

[32] 223 U. S. 85, 32 Sup. Ct. Rep. 187, 56 L. ed. 359.

[33] In the case of Prosser v. Finn, 208 U. S. 67, 73, 28 Sup. Ct. Rep. 225, 52 L. ed. 392, the court held that a special agent of the general land office was an employee within the meaning of section 452, Revised Statutes (Comp. Stats. 1901, p. 257; 6 Fed. Stats. Ann. 452), and subject to its prohibition, and that the government, by its proper officers or department, could cancel any entry made by him and treat the lands as public lands which could be patented to others.

§ 662. **Commissioner of the general land office—Appointment, powers, and duties.**—The head of the land office is the commissioner of the general land office, who is appointed by the president, by and with the advice and consent of the senate. His duty is to perform, under the direction of the secretary of the interior, all executive acts appertaining to the surveying and sale of the public lands, and also such as relate to private claims for lands and the issuing of patents for all grants of land under authority of the government.[34]

He is clothed with liberal powers of control, to be exercised for the purposes of justice and to prevent the consequences of inadvertence, irregularity, mistake or fraud in the important and extensive operations of that office for the disposal of the public domain.[35]

This general power of superintendence gives the commissioner of the general land office direct supervision over registers and receivers, whose decisions on all questions he is authorized to review.[36]

Under the direction of the secretary of the interior, the commissioner is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of the federal laws regulating the sale and disposal of the public lands not otherwise specially provided for.[37]

[34] Rev. Stats., §§ 446, 453; Comp. Stats. 1901, pp. 255, 257; 6 Fed. Stats. Ann. 210, 212; Cahn v. Barnes, 5 Fed. 326, 331; Weaver v. Fairchild, 50 Cal. 360, 362; Knight v. U. S. Land Assn., 142 U. S. 161, 177, 12 Sup. Ct. Rep. 258, 35 L. ed. 974.

[35] Bell v. Hearne, 19 How. 252, 262, 15 L. ed. 614.

[36] Barnard v. Ashley, 18 How. 43, 45, 15 L. ed. 285; Swigert v. Walker, 49 Kan. 100, 30 Pac. 162, 163; Hosmer v. Wallace, 47 Cal. 461, 469; Orchard v. Alexander, 157 U. S. 372, 377, 15 Sup. Ct. Rep. 635, 39 L. ed. 737; Lusk v. Mercantile R. E. & L. S. Co., 7 Kan. App. 581, 52 Pac. 455, 456; *post*, § 772.

[37] Rev. Stats., § 2478; Knight v. U. S. Land Assn., 142 U. S. 161,

These regulations, when not repugnant to the acts of congress, have the force and effect of laws,[38] and courts take judicial notice of them.[39]

The commissioner of the general land office has authority to cancel an entry illegally allowed. The exercise of this power is necessary to the due administration of the functions of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department.[40]

But such authority can only be exercised upon notice to the entryman.[41]

§ 663. Secretary of the interior.—The secretary is the guardian over the public lands for the people of

178, 12 Sup. Ct. Rep. 258, 35 L. ed. 974; Warner Valley Stock Co. v. Smith, 165 U. S. 28, 33, 34, 17 Sup. Ct. Rep. 225, 41 L. ed. 621.

[38] Poppe v. Athearn, 42 Cal. 606, 619; Chapman v. Quinn, 56 Cal. 266, 273; United States v. Eliason, 16 Pet. 291, 302, 10 L. ed. 968; Boske v. Comingore, 177 U. S. 459, 468, 20 Sup. Ct. Rep. 701, 44 L. ed. 846; Dastervignes v. United States, 122 Fed. 30, 33, 58 C. C. A. 346; Shannon v. United States, 160 Fed. 870, 874; In re Yard, 38 L. D. 59, 62.

[39] Caha v. United States, 152 U. S. 211, 221, 14 Sup. Ct. Rep. 513, 38 L. ed. 415; Whitney v. Spratt, 25 Wash. 62, 87 Am. St. Rep. 738, 64 Pac. 919, 920; Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 309, 23 Sup. Ct. Rep. 692, 24 Sup. Ct. Rep. 860, 47 L. ed. 1064.

[40] Cornelius v. Kessel, 128 U. S. 456, 461, 9 Sup. Ct. Rep. 122, 32 L. ed. 482; Barnard's Heirs v. Ashley's Heirs, 18 How. 43, 45, 15 L. ed. 285; Bell v. Hearne, 19 How. 252, 262, 15 L. ed. 614; Harkness v. Underhill, 1 Black, 316, 325, 17 L. ed. 208; Marquez v. Frisbie, 101 U. S. 473, 476, 25 L. ed. 800; United States v. Schurz, 102 U. S. 378, 383, 26 L. ed. 167; Steel v. St. Louis Smelting Co., 106 U. S. 447, 450, 1 Sup. Ct. Rep. 389, 27 L. ed. 226; Hawley v. Diller, 178 U. S. 476, 477, 20 Sup. Ct. Rep. 986, 44 L. ed. 1157; Mineral Farm Min. Co. v. Barrick, 33 Colo. 410, 80 Pac. 1055, 1056.

[41] Risdon v. Davenport, 4 S. D. 555, 57 N. W. 482, 483.

the United States, and is charged with the supervision of public business relating to the public lands, including mines.[42] The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands.[43]

He exercises a supervisory control over the decisions, rulings and acts of the commissioner.[44]

He has supervisory powers over all officers below him, and is the final arbiter of all questions of fact.[45]

He may exercise this power not only on formal notice or appeal, according to the rules of the department, but on his own motion, and his action in such a matter is unassailable in the courts in a collateral proceeding.[46]

He may not, however, annul a decision of his predecessor which determines the rights of the parties to a contest for entry of public lands, such determination

[42] Warner Valley Stock Co. v. Smith, 165 U. S. 28, 34, 17 Sup. Ct. Rep. 225, 41 L. ed. 621; In re Yard, 38 L. D. 59, 61.

[43] Knight v. United States Land Assn., 142 U. S. 161, 177, 12 Sup. Ct. Rep. 258, 35 L. ed. 974; Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 324, 23 Sup. Ct. Rep. 698, 47 L. ed. 1074; United States ex rel. Ness v. Fisher, 223 U. S. 683, 688, 32 Sup. Ct. Rep. 356, 56 L. ed. 610; O'Connor v. Gertgens, 85 Minn. 481, 89 N. W. 866, 872.

[44] Hays v. Steiger, 76 Cal. 555, 560, 18 Pac. 670; Magwire v. Tyler, 1 Black, 195, 202, 17 L. ed. 137; Snyder v. Sickles, 98 U. S. 203, 210, 25 L. ed. 97; Buena Vista County v. Iowa Falls & S. C. R. R., 112 U. S. 165, 175, 5 Sup. Ct. Rep. 84, 28 L. ed. 680; Lee v. Johnson, 116 U. S. 48, 51, 6 Sup. Ct. Rep. 249, 29 L. ed. 570.

[45] Lawrence v. Potter, 22 Wash. 32, 60 Pac. 147, 149.

[46] Knight v. United States Land Assn., 142 U. S. 161, 177, 12 Sup. Ct. Rep. 258, 35 L. ed. 974; Hestres v. Brennan, 50 Cal. 211, 217; Reed v. Bowron, 32 L. D. 383.

being a judicial act which can only be reviewed by the courts.[47]

§ 664. Jurisdiction of the land department.—We have no immediate concern with the powers and functions of the land department in its dealings with any class of the public lands other than those falling within the purview of the mining laws. Yet, in administering these laws, all departments of the public land system are more or less blended. Conflicts are constantly arising between claimants asserting rights under different branches of the system, requiring a consideration of different elements and of different laws in a cognate series. In administering these laws certain powers are confided to the department, in the exercise of which that tribunal is guided and governed by well-defined rules and established principles, applicable alike to their dealings with all classes of public lands.

The interior department is specifically authorized and empowered to enforce and execute the public land laws of the United States.[48] The land department is a *quasi*-judicial tribunal, and has exclusive jurisdiction over the disposition of lands of the public domain in the absence of specific legislation to the contrary. Pending final action of the department with respect to title to public lands, generally the state or federal courts will not interfere, nor entertain actions relating thereto.[49]

[47] Emblen v. Lincoln Land Co., 94 Fed. 710, 714; S. C., on appeal, 102 Fed. 559, 42 C. C. A. 499, citing Noble v. Railway Co., 147 U. S. 165, 171, 13 Sup. Ct. Rep. 271, 37 L. ed. 123, and United States v. Stone, 2 Wall. 525, 17 L. ed. 765. But see Gage v. Gunther, 136 Cal. 338, 68 Pac. 710; Harkrader v. Goldstein, 31 L. D. 87.

[48] Rev. Stats., §§ 441, 453, 2478.

[49] Low v. Katalla Co., 40 L. D. 534, and cases cited.

In outlining in the previous sections the powers and duties of the several officers constituting in the aggregate the land department, we have necessarily presented to some extent the scope of the jurisdiction of that tribunal.[50]

The limit of its authority is found in the acts of congress. It cannot grant land.[51] It cannot direct or permit entries to be made or purchases to be consummated except in cases authorized by some federal law.[52] It cannot take away the property of one and give it to another. Its jurisdiction is suspended where lands theretofore public have, by virtue of congressional legislation or lawful executive order, been withdrawn from the operation of the public land laws. Its jurisdiction terminates and its authority ceases when the land passes into private ownership and the title of the government is transmitted through the forms of law.[52a] The test of jurisdiction is not "right decision," but the right to enter upon the inquiry and make some decision—i. e., had the department the power to hear and determine the claims of the applicants of the land and to dispose of it in accordance with its decision?[53]

[50] For general statement as to functions of the land department, see Germania Iron Co. v. James, 89 Fed. 811, 32 C. C. A. 348; James v. Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; note to Hartman v. Warren, 76 Fed. 157, 22 C. C. A. 30; Gage v. Gunther, 136 Cal. 338, 68 Pac. 710, 712.

[51] Shanklin v. McNamara, 87 Cal. 371, 26 Pac. 345, 347.

[52] Parker v. Duff, 47 Cal. 554.

[52a] C. Henry Bunte, 41 L. D. 520.

[53] King v. McAndrews, 111 Fed. 860, 863, 50 C. C. A. 29; New Dunderberg v. Old, 79 Fed. 598, 602, 25 C. C. A. 116; Bradley v. Dells Lumber Co., 105 Wis. 245, 81 N. W. 394, 396; *post*, § 772. The principle announced is recognized in Old Dominion Copper M. Co. v. Haverly, 11 Ariz. 241, 90 Pac. 333, 335, but note the labored attempt to distinguish the prior case of Kansas City M. & M. Co. v. Clay, 3 Ariz. 326, 29 Pac. 9. "Jurisdiction is authority to hear and determine."

With the exercise of its discretionary powers the courts cannot interfere,[54] and within certain recognized limits its judgments are final. Of course it is well recognized that the ministerial duty of these officers may be so clear that its performance may be forced by *mandamus*.[55]

The supreme court of the United States[56] has used the following language with reference to the power of the land department to initiate a proceeding and itself determine the validity or invalidity of a location independently of an application for patent:—

> Undoubtedly when the department rejected the application for a patent it could have gone further and

McNitt v. Turner, 16 Wall. 352, 366, 21 L. ed. 341; Copley v. Ball, 176 Fed. 682, 691, 100 C. C. A. 234.

[54] Michigan L. & L. Co. v. Rust, 168 U. S. 589, 593, 18 Sup. Ct. Rep. 208, 42 L. ed. 591; Brown v. Hitchcock, 173 U. S. 473, 477, 19 Sup. Ct. Rep. 485, 43 L. ed. 772; Emblen v. Lincoln Land Co., 184 U. S. 660, 663, 22 Sup. Ct. Rep. 523, 46 L. ed. 736; In re Emblen, 161 U. S. 52, 56, 16 Sup. Ct. Rep. 487, 40 L. ed. 613; note to Hartman v. Warren, 76 Fed. 157, 22 C. C. A. 30; Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 23 Sup. Ct. Rep. 692, 24 Sup. Ct. Rep. 860, 47 L. ed. 1064; Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 325, 23 Sup. Ct. Rep. 698, 47 L. ed. 1074; Bockfinger v. Foster, 190 U. S. 116, 126, 23 Sup. Ct. Rep. 836, 47 L. ed. 975; Bates & Guild Co. v. Payne, 194 U. S. 106, 109, 24 Sup. Ct. Rep. 595, 48 L. ed. 894; Humbird v. Avery, 195 U. S. 480, 505, 25 Sup. Ct. Rep. 123, 49 L. ed. 286; Oregon v. Hitchcock, 202 U. S. 60, 70, 26 Sup. Ct. Rep. 568, 50 L. ed. 935; United States ex rel. Ness v. Fisher, 223 U. S. 683, 692, 32 Sup. Ct. Rep. 356, 56 L. ed. 610; Kendall v. Long, 66 Wash. 62, 119 Pac. 9, 11.

[55] Ballinger v. United States, 216 U. S. 240, 249, 30 Sup. Ct. Rep. 338, 54 L. ed. 464; citing Roberts v. United States, 176 U. S. 221, 230, 20 Sup. Ct. Rep. 376, 44 L. ed. 443; Noble v. Union River Logging Co., 147 U. S. 165, 171, 13 Sup. Ct. Rep. 271, 37 L. ed. 123; Barney v. Dolph, 97 U. S. 652, 656, 24 L. ed. 1063; Simmons v. Wagner, 101 U. S. 260, 261, 25 L. ed. 910; United States v. Schurz, 102 U. S. 378, 383, 26 L. ed. 167; Fisher v. United States ex rel. Grand Rapids Timber Co., 37 App. Cas. D. C. 436 (Court of Appeals, Dist. of Columbia).

[56] Clipper Min. Co. v. Eli Min. Co., 194 U. S. 220, 223, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

> set aside the placer location, and it can now, by direct proceedings upon notice, set it aside and restore the land to the public domain. But it has not done so, and therefore it is useless to consider what rights other parties might then have.

This *dictum* states the proposition rather more broadly than the accepted measure of the department's jurisdiction in such matters was formerly generally conceded to be, viz.: that questions affecting the right of possession of mining locations are committed exclusively to determination by the courts, especially in the absence of applications for patent.[57] Of course, as far as issuance of patent is concerned, there can be no question but that the department has power to, and it is its duty to independently investigate and determine for such purpose for itself the validity of the location, and in this respect the question is not one within the exclusive jurisdiction of the courts.[58] Controversies committed to the courts for determination are those between adverse claimants to possession under conflicting locations of the same land, and those only.[59] That the department can, independently of a patent application, by direct proceedings declare a location invalid, set it aside, and restore the land to the public domain is a rather recent enlargement of its powers as they have generally been accepted in the past.

That this view as to its jurisdictional powers in such matters is also entertained by the land department is forcibly set forth in the so-called "Yard Decision,"[60]

[57] Gen. Min. Reg., par. 55, Appendix; Nome & Sinook Co. v. Townsite of Nome (on review), 34 L. D. 276.

[58] Clipper Min. Co. v. Eli Min. Co., 33 L. D. 660, 669; Bunker Hill etc. Co. v. Shoshone Min. Co., 33 L. D. 142, 149.

[59] Id.

[60] In re Yard, 38 L. D. 59, 61–68.

where this question of jurisdiction was elaborately discussed. A brief history of the facts surrounding this case will illuminate the conclusions reached by the department. H. H. Yard and associates had made several hundred association placer locations which covered several thousand acres of land, much of it lying in the Plumas National Forest, California. They embraced considerable tracts of valuable timber, and at the instigation of forest officers and private citizens who complained of this wholesale attempt to control this vast acreage of public domain the department of the interior directed the local officers to order a hearing and issue notice to Yard et al., charging that the land covered by these "paper locations" was nonmineral and that the locations were defective for want of valid discoveries and were not made in good faith. Yard resisted this proceeding on the ground that since he had made no application for patent, the land department was without jurisdiction to determine these questions. After an elaborate discussion of the authorities, the department held that inasmuch as a valid location resulted in a virtual disposal of those public lands embraced therein, and since it was charged with the duty of administering the public land and with the disposing of lands therein to qualified applicants, it was incumbent upon the department to see that the public lands are not withheld from use by the government or from acquisition by proper applicants, and it had full jurisdiction to investigate all questions affecting the validity of any alleged or colorable locations on the public domain at any time, even prior to application for patent, and had power to initiate proceedings to determine the *status* of such locations in order that appropriate action might be taken which would

secure compliance with and enforcement of the federal laws and regulations. The reasoning was largely based on the peculiar function of the government in the administration and control of its forest reserves wherein it occupied a position very similar to that of an individual claimant to the open public domain under any of the nonmineral land laws.[61] The reasoning is broad enough, however, to include the power of investigation of the validity of locations situated on the open public domain not embraced within forest reserves.

There is some question as to the effect of such proceedings. While they materially aided in "clearing up the atmosphere" in the Yard situation, there is nothing to prevent the location claimant from immediately proceeding to make a new location covering the same tract of ground and the department would frequently gain little as a result of its inquiry. The Yard decision admitted that the department did not have judicial authority to remove locators from their invalid claims, but had the power to declare them void and refuse to recognize them as the basis for patent proceedings.[61a] With these preliminary observations, we will proceed to consider the effect of departmental decisions upon questions of fact and law, and upon mixed questions of law and fact.

[61] See United States v. Rizzinelli, 182 Fed. 675, which holds that subject to the locator's legitimate use for mining purposes, the government continues to be owner of the land, and is interested in conserving its value and preventing injury and waste.

[61a] Since the foregoing was in type our attention has been called to a recent decision by the secretary (In re Nichols & Smith, Oct. 24, 1913, unpublished), which overrules the doctrine of the Yard case as being "entirely indefensible, whether viewed from an administrative or legal standpoint."

§ 665. The effect of the decisions of the land department upon questions of fact.—There is one proposition of law involved in the administration of the public land system upon which all courts agree: The decisions of the land department upon questions of fact, in a proceeding within the scope of its jurisdiction, are, in the absence of fraud or imposition, conclusive.[62]

As was said by the supreme court of the United States:—

62 Wilcox v. Jackson, 13 Pet. 496, 511, 10 L. ed. 270; Johnson v. Townsley, 13 Wall. 72, 83, 20 L. ed. 485; Shepley v. Cowan, 91 U. S. 330, 340, 23 L. ed. 424; Moore v. Robbins, 96 U. S. 530, 535, 24 L. ed. 848; Quinby v. Conlan, 104 U. S. 420, 425, 26 L. ed. 800; St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 641, 26 L. ed. 875, 11 Morr. Min. Rep. 673; Lee v. Johnson, 116 U. S. 48, 51, 6 Sup. Ct. Rep. 249, 29 L. ed. 570; Carr v. Fife, 156 U. S. 494, 501, 15 Sup. Ct. Rep. 427, 39 L. ed. 508; Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155, 166, 15 Sup. Ct. Rep. 779, 39 L. ed. 931; Stewart v. McHarry, 159 U. S. 643, 650, 16 Sup. Ct. Rep. 117, 40 L. ed. 290; Diller v. Hawley, 81 Fed. 651, 656, 26 C. C. A. 514; Cooke v. Blakely, 6 Kan. App. 707, 50 Pac. 981, 983; Harrington v. Wilson, 10 S. D. 606, 74 N. W. 1055, 1056; Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398, 400; Wormouth v. Gardner, 125 Cal. 316, 58 Pac. 20, 21; Acers v. Snyder, 8 Okl. 659, 58 Pac. 780, 781; Lawrence v. Potter, 22 Wash. 32, 60 Pac. 147, 148; James v. Germania Iron Co., 107 Fed. 597, 600, 46 C. C. A. 476; King v. McAndrews, 111 Fed. 860, 863, 50 C. C. A. 29; Moss v. Dowman, 176 U. S. 413, 415, 20 Sup. Ct. Rep. 429, 44 L. ed. 526; Cook v. McCord, 9 Okl. 200, 60 Pac. 497, 500; Gardner v. Bonestell, 180 U. S. 362, 369, 21 Sup. Ct. Rep. 399, 45 L. ed. 574; Gray's Harbor Co. v. Drumm, 23 Wash. 706, 63 Pac. 530, 531; O'Connor v. Gertgens, 85 Minn. 481, 89 N. W. 866, 872; Manley v. Tow, 110 Fed. 241, 245; Thompson v. Basler, 148 Cal. 646, 113 Am. St. Rep. 321, 84 Pac. 161, 162; Cragie v. Roberts, 6 Cal. App. 309, 92 Pac. 97, 99; Whitcomb v. White, 214 U. S. 15, 16, 29 Sup. Ct. Rep. 599, 53 L. ed. 889; De Cambra v. Rogers, 189 U. S. 119, 122, 23 Sup. Ct. Rep. 519, 47 L. ed. 734; Bates & Guild Co. v. Payne, 194 U. S. 106, 108, 24 Sup. Ct. Rep. 595, 48 L. ed. 894; Le Marchal v. Tegardin, 175 Fed. 682, 685, 99 C. C. A. 236; Emmons v. United States (C. C. Or.), 175 Fed. 514, 515. See, also, Old Dominion Copper Co. v. Haverly, 11 Ariz. 241, 90 Pac. 333, 335, speciously differentiating the earlier case of Kansas City M. & M. Co. v. Clay, 3 Ariz. 326, 29 Pac. 9, 10.

> It is the established doctrine, expressed in numerous decisions of this court, that whenever congress has provided for the disposition of any portion of the public lands of a particular character, and authorized the officers of the land department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and to determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack.[63]

It is useless to multiply authorities in support of a doctrine so well established.

A possible modification of the rule seems to be recognized by the supreme court of the United States.

> Where each party has a patent from the government, and the question is as to the superiority of the title under those patents, if this depends upon extrinsic facts not shown by the patents themselves, we think it is competent, in any judicial proceeding where this question of superiority of title arises, to establish it by proof of those facts.[64]

We shall have occasion to recur to this subject when dealing with the force and effect of a patent.

The land department itself is not bound by its own adjudication that land is of a certain character, provided title has not passed from the government by issuance of patent, and it may subsequently again consider and determine the character of land claimed under the mineral laws.[64a]

[63] Barden v. Northern Pacific R. R., 154 U. S. 288, 327, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992.

[64] Iron S. M. Co. v. Campbell, 135 U. S. 286, 292, 10 Sup. Ct. Rep. 765, 34 L. ed. 155, 16 Morr. Min. Rep. 218.

[64a] C. Henry Bunte, 41 L. D. 520.

§ 666. Decisions of the land department upon questions of law and mixed questions of law and fact.—The construction given to a statute by those charged with the duty of executing it, if uniform and continuous, is entitled to the most respectful consideration, and ought not to be overruled without cogent reasons,[65] and unless it be clear that it is erroneous.[66] Such construction is in the highest degree persuasive, if not absolutely controlling in its effect.[67]

This principle "is so firmly imbedded in our jurisprudence that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect." [68]

[65] United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588; Hastings & Dakota R. R. v. Whitney, 132 U. S. 357, 366, 10 Sup. Ct. Rep. 112, 33 L. ed. 363; Brown v. United States, 113 U. S. 568, 571, 5 Sup. Ct. Rep. 648, 28 L. ed. 1079; Montana Ltd. v. Clark, 42 Fed. 626, 629, 16 Morr. Min. Rep. 80; Knowlton v. Moore, 178 U. S. 41, 56, 92, 20 Sup. Ct. Rep. 747, 44 L. ed. 969; United States v. S. P. R. R., 184 U. S. 49, 56, 22 Sup. Ct. Rep. 285, 46 L. ed. 425; O'Connor v. Gertgens, 85 Minn. 481, 89 N. W. 866, 871; Hawley v. Diller, 178 U. S. 476, 488, 20 Sup. Ct. Rep. 986, 44 L. ed. 1157; Hewitt v. Schultz, 180 U. S. 139, 157, 21 Sup. Ct. Rep. 309, 45 L. ed. 463; Fairbank v. United States, 181 U. S. 283, 311, 21 Sup. Ct. Rep. 648, 45 L. ed. 862; Waterloo M. Co. v. Doe, 82 Fed. 45, 50, 27 C. C. A. 50, 19 Morr. Min. Rep. 1; McFadden v. Mountain View M. & M. Co., 97 Fed. 670, 673, 38 C. C. A. 354; United States v. Burkett, 150 Fed. 208, 211; McMichael v. Murphy, 197 U. S. 304, 312, 25 Sup. Ct. Rep. 460, 49 L. ed. 766.

[66] United States v. Johnston, 124 U. S. 236, 253, 8 Sup. Ct. Rep. 446, 31 L. ed. 389.

[67] United States v. Graham, 110 U. S. 219, 221, 3 Sup. Ct. Rep. 582, 28 L. ed. 126; Calhoun G. M. Co. v. Ajax M. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 59 Pac. 607, 611, 50 L. R. A. 209, 20 Morr. Min. Rep. 192; note to Hartman v. Warren, 76 Fed. 157, 22 C. C. A. 30.

[68] Pennoyer v. McConnaughy, 140 U. S. 1, 23, 11 Sup. Ct. Rep. 699, 35 L. ed. 363.

The rule, however, is not absolute,[69] but is subject to the limitation that the construction must have been continuously in force for a long time,[70] and applies only in cases of ambiguity and doubt.[71]

With language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid.[72] No practice inconsistent with that meaning can have any effect.[73]

The existence of these rules suggests that the courts are not *bound* by the departmental decisions on questions of law. They have a right to investigate legal rulings made by the department—a right which, in the absence of fraud or imposition, does not exist where only questions of fact are involved.

Where the land officers have clearly mistaken the law of the case as applicable to the facts, courts of equity

69 Houghton v. Payne, 194 U. S. 88, 99, 24 Sup. Ct. Rep. 490, 48 L. ed. 888.

70 Merritt v. Cameron, 137 U. S. 542, 552, 11 Sup. Ct. Rep. 174, 34 L. ed. 772. By way of an explanation for "changed rulings," the secretary of the interior says: "Yet it is the consequence of human infirmity that even the highest and wisest tribunal known to man sometimes finds its interpretations of laws not well reasoned and its long established rules of practice not such as most certain to attain justice, the ultimate object of all law and all rules of practice, and that a change is necessary in furtherance of justice and to suppress fraud." In re Lemmon, 36 L. D. 543.

71 Swift Co. v. United States, 105 U. S. 691, 695, 26 L. ed. 1108; United States v. Tanner, 147 U. S. 661, 663, 13 Sup. Ct. Rep. 436, 37 L. ed. 321; Merritt v. Cameron, 137 U. S. 542, 552, 11 Sup. Ct. Rep. 174, 34 L. ed. 772; McFadden v. Mt. View M. & M. Co., 87 Fed. 154, 156.

72 United States v. Graham, 110 U. S. 219, 221, 3 Sup. Ct. Rep. 582, 28 L. ed. 126; Houghton v. Payne, 194 U. S. 88, 99, 24 Sup. Ct. Rep. 490, 48 L. ed. 888.

73 United States v. Alger, 152 U. S. 384, 397, 14 Sup. Ct. Rep. 635, 38 L. ed. 488.

may give relief.[74] Therefore, the construction of the law by the department as applied to the facts found by them to be true [75] does not conclude the courts.[76]

Where the land officers, upon the uncontradicted facts, commit an error of law by which the land has been awarded to a party to the prejudice of the right of another, the latter is entitled to relief at the hands of the courts.[77]

It is only where it is made plain that the officers of the land department have by a mistake of law deprived a party of land to which he is rightfully entitled that a court of equity is justified in setting aside the action of the department.[78] The nature of the mistake and the manner of its occurrence must be pleaded fully.[79]

Where the charge is, that the land department has erred in the decision of a mixed question of law and fact, what the facts were as laid before and found by

[74] Baldwin v. Starks, 107 U. S. 463, 465, 2 Sup. Ct. Rep. 473, 27 L. ed. 526; Gage v. Gunther, 136 Cal. 338, 68 Pac. 710.

[75] Hays v. Steiger, 76 Cal. 555, 558, 18 Pac. 670.

[76] Wisconsin Cent. R. R. Co. v. Forsythe, 159 U. S. 46, 61, 15 Sup. Ct. Rep. 1020, 40 L. ed. 71, and cases cited; Hawley v. Diller, 178 U. S. 476, 488, 20 Sup. Ct. Rep. 986, 44 L. ed. 1157; Manley v. Tow, 110 Fed. 241, 248; Hemmer v. United States, 204 Fed. 898, 905.

[77] Moore v. Robbins, 96 U. S. 530, 535, 24 L. ed. 848; James v. Germania Iron Co., 107 Fed. 597, 600, 46 C. C. A. 476; Germania Iron Co. v. James, 89 Fed. 811, 817, 32 C. C. A. 348; Lee v. Johnson, 116 U. S. 48, 49, 6 Sup. Ct. Rep. 249, 29 L. ed. 570; Lawrence v. Potter, 22 Wash. 32, 60 Pac. 147; Gourley v. Countryman, 18 Okl. 220, 90 Pac. 427, 428; Le Marchal v. Tegarden, 175 Fed. 682, 685, 99 C. C. A. 236; Kendall v. Long, 66 Wash. 62, 119 Pac. 9, 12.

[78] Moss v. Dowman, 176 U. S. 413, 415, 20 Sup. Ct. Rep. 429, 44 L. ed. 526; Id., 88 Fed. 181, 183, 31 C. C. A. 447; King v. McAndrews, 111 Fed. 860, 863, 50 C. C. A. 29; notes to Hartman v. Warren, 76 Fed. 157, 22 C. C. A. 30, and Carson City G. & S. M. Co. v. North Star M. Co., 83 Fed. 658, 28 C. C. A. 333, 19 Morr. Min. Rep. 118; Ramsey v. Tacoma Land Co., 31 Wash. 351, 71 Pac. 1024, 1025.

[79] United States v. Northern Pac. Ry., 95 Fed. 864, 870, 37 C. C. A. 290.

the department must be shown, so as to enable the court to see clearly that the law has been misconstrued.[80]

Where there is a mixed question of law and fact and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.[81]

The general rule is thus stated by the supreme court of the United States:—

> When the decision of questions of fact is committed to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact or of law alone, his action will carry with it the strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power and will occasionally exercise the right of so doing.[82]

[80] Durango L. & C. Co. v. Evans, 80 Fed. 425, 25 C. C. A. 523; Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398, 401.

[81] Marquez v. Frisbie, 101 U. S. 473, 476, 25 L. ed. 800; Whitcomb v. White, 214 U. S. 15, 17, 29 Sup. Ct. Rep. 599, 53 L. ed. 889.

[82] Bates & Guild Co. v. Payne, 194 U. S. 106, 109, 24 Sup. Ct. Rep. 595, 48 L. ed. 894.

CHAPTER II.

THE SURVEY FOR PATENT.

§ 670. Application for survey.
§ 671. The survey of lode claims.
§ 672. The survey of placer claims — Descriptive report.
§ 673. The surveyor-general's certificate as to expenditures.

§ 670. Application for survey.—The official survey is the initial step in the proceedings for the acquisition of mineral patent except in the case of placers upon surveyed lands, which conform to legal subdivisions. The application for patent, notice thereof, entry and the patent itself must refer to and comport with the official survey. It constitutes the delimitation of the claim upon the survey records of the land department and is the official and controlling advice of the *locus* and extent of the claim for which patent proceedings are prosecuted.[1] The first step toward securing an official survey for a mining claim is an application addressed to the United States surveyor-general of the state or territory in which the claim is situated for an order for survey.

This application must be in writing, signed by the applicant, his agent, or attorney,[2] and should contain the name of the claimant, the name of the location, the state, county, and mining district wherein it is situated, and if upon surveyed lands, the section, township, and range. As claimants are at liberty to select, for the purpose of making the survey, any United States

[1] Gilson Asphaltum Co., 33 L. D. 612.

[2] The signature must be in writing, not typewritten. Tipton G. M. Co., 29 L. D. 718. The surveyor-general's office provides a printed form on which these applications are usually made.

deputy authorized to act in the land district,[3] the application should designate the deputy.

The application must be accompanied by a copy of the location notice or certificate upon which the survey is to be based, duly certified by the officer charged by the state or district laws with recording such notices or certificates, and if there is more than one location to be included in the survey, each notice of location should be certified to separately. If any amended locations have been made, the notices or certificates of such must also be supplied, as they form the basis of the field work of the deputy surveyor.

Upon filing the application, the claimant is furnished an estimate of the amount of fees required to defray the expenses of platting and other work in the surveyor-general's office. The amount of such estimate must be deposited with some assistant United States treasurer or designated United States depositary, to the credit of a special fund created by "individual depositors for surveys of the public lands." Receipts for such deposit are issued in triplicate. One is delivered to the surveyor-general, one forwarded to the secretary of the treasury at Washington, and the other is retained by the claimant.

The government has no concern with the fees of deputy surveyors.[4] The claimant adjusts the compensation with the deputy, the commissioner of the general land office having the power to fix the maximum rate.[5]

[3] Rev. Stats., § 2334; 17 Stat. 95; Comp. Stats. 1901, p. 1435; 5 Fed. Stats. Ann. 49.

[4] In re Foote, 2 L. D. 773; Golden Rule Co., 37 L. D. 95.

[5] Golden Rule Co., 37 L. D. 95. In case of an order made for an amended survey of a mining claim, there is no authority for requiring the deputy mineral surveyor to execute such survey without further compensation. In re Anderson, 26 L. D. 575.

Upon the filing of the application, accompanied by the certified copies of location notices or certificates, and the presentation of the receipt showing that the requisite deposit has been made, the surveyor-general issues his order directed to the deputy mineral surveyor authorizing the survey. This order is accompanied by copies of the location notices filed by the claimant with the surveyor-general.

As a rule, the order for survey issues as a matter of course. Should it be refused, the claimant's only remedy is by appeal to the commissioner of the general land office.

Where two or more locations are held by one and the same person or association of persons, which locations are contiguous, a survey may be ordered of the entire group.[6]

Claims which merely corner are not contiguous and cannot be embraced in one application.[7]

A single application may embrace and a single patent issue for placer and lode claims where the land involved lies in one body or piece, has been claimed or located for valuable deposits, and the several claims have a common ownership.[8]

Where properties thus consolidated are applied for, the applications for an order of survey should enumerate all the locations within the group and plainly state the facts of common ownership and contiguity. An entry will be refused at the land office where any of the claims are shown to be noncontiguous.[9] Where a

[6] Champion M. Co., 4 L. D. 362, citing St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875, 11 Morr. Min. Rep. 673; In re Mackie, 5 L. D. 199.

[7] Hidden Treasure Cons. Q. M., 35 L. D. 485; Tomera Placer Claim, 33 L. D. 560. See, also, Min. Reg., par. 12, Appendix.

[8] Mayflower G. M. Co., 29 L. D. 7.

[9] Apple Blossom Placer v. Cora Lee Lode, 21 L. D. 438.

survey of an aggregation of claims is sought, it is of course necessary to file with the surveyor-general certified copies of all location notices upon which a claim to any of the locations within the group is based, and each copy should be certified to separately.

Naturally the deposit to cover expenses for office work in the surveyor-general's office required in the case of group applications will be proportionately larger than in those embracing single locations. No definite rule is fixed, however. It is regulated entirely by the circumstances of each particular case. The various surveyors-general offices have schedules of the deposits required for single claims and groups, but these are not uniform in the different states. Where the amount of office work exceeds the estimate, an additional deposit may be called for before final approval of the survey, and if the original deposit is not entirely consumed, the applicant is entitled to a refund of the unused balance.[10]

§ 671. The survey of lode claims.—It is not our purpose to deal minutely with the manner in which mineral surveys are to be made. The land department supplies the deputy surveyors with complete manuals of instruction for their guidance,[11] to which they will resort in case of doubt, rather than to a treatise upon mining law. There are a few elements, however, of greater or less importance upon which the validity of subsequent proceedings may depend, which may be appropriately noted.

The surveyor cannot make a location for the claimant.[12] His functions are limited to a survey of one

10 In re Mackie, 5 L. D. 199.

11 See, also, paragraphs 34–38 and 129–169 of Mining Regulations.

12 See Min. Reg., par. 35.

already made. He determines the *situs* and boundaries of the location from the notices, original and amended, copies of which accompany the order of survey, and from an examination of the ground and surface markings referred to in the notices. He cannot disregard these. He is strictly charged under instructions from the land department that surveys of mining claims must be made in strict conformity to the lines established by the original (or amended, as the case may be) location as recorded and marked on the ground.[13]

Should he fail to include within his survey all that was properly claimed and embraced within the location, the claimant may have the error corrected by a resurvey.[14]

Many difficulties encountered in the progress of patent proceedings are due to imperfect notices and insufficient or irregular marking of the location in the first instance. These may all be avoided by rectifying lines by an informal or unofficial survey, and the making of an amended notice of location *prior to applying for an order for survey*.[15] A survey cannot be based upon an amended notice of location made after the survey is ordered,[16] without applying for an amended order, which is permissible under the regulations.[17]

[13] Lincoln Placer, 7 L. D. 81; Circ. Instructions, Nov. 20, 1873; Copp's Min. Lands, 2d ed., p. 58; Commrs. Letter, 1 Copp's L. O. 12.

[14] Basin M. & C. Co. v. White, 22 Mont. 147, 55 Pac. 1049, 1050.

[15] *Ante*, § 396.

[16] Rose Lode Claims, 22 L. D. 83; Tipton G. M. Co., 29 L. D. 718.

[17] Where an application for patent has been allowed to proceed to entry, this constitutes a waiver of any additional rights acquired by amendment of the original location, even though the amendment may have been made prior to the entry. The additional tract must be regarded as having been embraced in an independent location, subject to all of the requirements of the law. Gilson Asphaltum Co., 33 L. D. 612.

Of course, slight variations from the lines as originally marked would not vitiate a survey.[18] The surveyor may draw in the end-lines to make them parallel,[19] and is permitted to cast off the area in excess of the statutory limit, by moving the monuments and stakes.[20]

The survey must describe the *locus,* with reference to the lines of public surveys, by a line connecting a corner of the claim with the nearest public corner of the United States surveys,[21] unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a mineral monument.[22]

Experience has demonstrated that this connecting or "tie" line is frequently established by calculation,[23] and in many instances is erroneous in either the call for distance or direction. In platting surveys in the surveyor-general's office the tie line reported by the deputy is naturally assumed to be mathematically cor-

18 Tipton G. M. Co., 29 L. D. 718.

19 Doe v. Sanger, 83 Cal. 203, 23 Pac. 365, 369; Doe v. Waterloo M. Co., 54 Fed. 935, 941; Philadelphia v. Pride of the West, 3 Copp's L. O. 82.

20 In re Empy, 10 Copp's L. O. 102; Howeth v. Sullenger, 113 Cal. 547, 552, 45 Pac. 841; *ante,* § 362. For an instance of this character, see Golden Reward M. Co. v. Buxton M. Co., 79 Fed. 868, 877.

21 See Hallett and Hamburg Lodes, 25 L. D. 104; In re McCarthy, 14 L. D. 105.

22 Gen. Min. Reg., par. 36, Appendix; In re Dodge, 6 Copp's L. O. 122.

The manner of constructing these mineral monuments is provided for in the "Manual of Instruction." Manual of 1895, pars. 15, 16, 17; In re Cavanah, 8 Copp's L. O. 5.

In re Standart, 25 L. D. 262, the requirement was waived, the connecting line being more than two miles.

23 Though paragraph 129 of Mining Regulations (see Appendix) now provides that the surveyor is precluded from calculating the connections to corners of the public survey.

rect. Subsequent surveys of adjoining or adjacent claims frequently develop the erroneous position of the prior tie line, and the result is a "paper conflict" on the plats in the surveyor-general's office, although there are no such conflicts on the ground. Under such circumstances the former custom of the commissioner of the general land office was to hold up the second survey, and call on the claimant and patentee under the prior erroneous survey to surrender his patent, provided the claimant had already been granted a patent, and to commence patent proceedings anew. Frequently the patentee would refuse to do so, preferring to stand on his patent, thus creating an embarrassment which was difficult of adjustment.

Whenever this situation has been presented to the courts, the erroneous tie line has been treated as a false call, which can be disregarded where the position of the claim as actually situated and monumented on the ground can be determined.[24]

The rulings of the land department on this question led to the passage of an act of congress amending section 2327 of the Revised Statutes,[25] which requires full effect to be given to the lines actually marked, defined and established upon the ground by the monuments of the official survey, and in case of any conflict between the monuments of patented claims and the descriptions contained in the patents, "the monuments on the ground shall govern and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto."

[24] Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 Pac. 901, 902; Bell v. Skillicorn, 6 N. M. 399, 28 Pac. 768, 769; Cullacott v. Cash G. M. Co., 8 Colo. 179, 6 Pac. 211, 15 Morr. Min. Rep. 392.

[25] 33 Stats. at Large, p. 545; Comp. Stats. (Supp. 1911), p. 611; 10 Fed. Stats. Ann. 235.

This is but a statutory confirmation of the law as previously construed by the courts, and the practice of the land department is now in accord with these principles.[26]

This statute relates exclusively to the determination of the *situs* of the particular tracts conveyed by patent, and does not in any way modify or affect the requirements governing notices of application for patent or excuse defects or irregularities in such notices.[27]

Where a survey is ordered of a composite or group of several contiguous locations, the boundaries of each location must be shown;[28] but the former practice was to the contrary. Each claim in the group should be tied to a public land corner or a mineral monument.[29] Undoubtedly the land department may require each integral part of the composite to be delineated. This is necessary to enable it to pass upon the question of contiguity, as well as to determine whether the expenditures made in the development of a common system should be applied to one or more claims in the group, for which purpose the relative position of each claim is important.[30]

[26] Sinnott v. Jewett, 33 L. D. 91; Drogheda & West Monroe Extension Claim, 33 L. D. 183; United States Min. Co. v. Wall, 39 L. D. 546; see, also, paragraph 147 of Mining Regulations.

[27] In re Peck, 34 L. D. 682.

[28] In re Mackie, 5 L. D. 199; Golden Sun M. Co., 6 L. D. 808; Argillite Ornamental Stone Co., 29 L. D. 585; Gen. Min. Reg., par. 30, Appendix.

[29] Juno and Other Lode Claims, 37 L. D. 365.

[30] It has been held that a patent may be issued describing the exterior boundaries of the composite and eliminating the interior lines of the individual locations. Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. 597, 600; affirmed, 83 Fed. 658, 28 C. C. A. 333, 19 Morr. Min. Rep. 118; St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875, 11 Morr. Min. Rep. 673. See, also, Peabody G. M. Co. v. Gold Hill M. Co., 111 Fed. 817, 820, 49 C. C. A. 637, 21 Morr. Min. Rep. 591.

The survey must show the area of the conflict with every prior official survey;[31] otherwise the plat will not be approved.[32] Unofficial surveys, however, may be ignored.[33]

A mining claim legally located may be surveyed according to the lines of the location as marked on the ground, even though the surveyed lines may in part or in whole fall upon patented lands. A patent issued upon such survey will exclude all lands within the lines of the survey which are also included in the prior patent.[34] This follows from the principles discussed in previous sections.[35]

The regulations of the land department require that the course and length of the vein should be marked upon the plat,[36] although this requirement is, in our judgment, unnecessary. Such marking is not evidence of the true position of the vein.[36a]

The position of the lode within the diagram will be presumed, for executive purposes, to be in the center and running in a straight line, and in the absence of other proof, the discovery point is held to be the center of the vein on the surface.[37] If the course of the vein diverges from a straight line, the applicant should indicate the direction and adjust his survey accordingly.[38]

Upon completion of the survey, the deputy forwards to the surveyor-general the field-notes, accompanied by

31 Thor Mine, 5 Copp's L. O. 51; Russell Lode, 5 Copp's L. O. 18. See Min. Reg., pars. 38, 147, 149 and 153, Appendix.

32 Grand Dipper Lode, 10 Copp's L. O. 240.

33 Wisconsin Mfg. Co. v. Cooper, 10 Copp's L. O. 69.

34 Mono Fraction Lode Claim, 31 L. D. 121.

35 §§ 363, 363a.

36 Min. Reg., par. 133, Appendix.

36a *Post*, § 780.

37 Min. Reg., par. 133, Appendix.

38 Bimetallic Mine, 15 L. D. 309.

a preliminary plat,[39] together with a report[40] of the manner in which the order was executed, a detailed statement of the nature and character of improvements found upon the premises, and an estimate of their value.[41]

If the value of the improvements is less than five hundred dollars for each claim at the time of the survey, the deputy surveyor may file with the surveyor-general supplemental proof showing that the requisite expenditure has been made prior to the expiration of the period of publication of notice of application for patent.[42]

In case the survey is of a composite or group of claims, and it is claimed that work done upon one was for the benefit of all, in furtherance of a common system of development, or where work has been done beyond the limits of a claim or group of claims for the purpose of development, the report of the deputy should show all the facts from which the surveyor-general, and the officers of the land department may clearly conclude that the claim or claims are entitled to credit for the work so done.[43]

Where application for patent is made for one claim, and the only improvements are upon an adjoining claim not embraced in the application, it must be clearly shown that improvements so made tend to de-

39 Min. Reg., par. 161, Appendix.

40 The *locus* of a mining claim should be fixed with mathematical accuracy, as well in the *report* of the survey as upon the surface of the earth. In re Castner, 17 L. D. 565; Wright v. Sioux Cons. M. Co., 29 L. D. 154.

41 Min. Reg., pars. 49, 156 and 157.

42 Min. Reg., par. 160, Appendix.

43 Andromeda Lode, 13 L. D. 146. See *post*, § 673.

velop the claim applied for and the certificate of the surveyor-general to this effect must be obtained.[44]

Where insufficient work has been done within the limits of one or more claims to entitle them to be patented, considered separately, but sufficient has been done on others within the group to entitle the entire group to be entered, the surveyor should make an apportionment, so that each claim may be credited with the statutory amount; that is, five hundred dollars to each.[45]

Upon the return of the field-notes and report to the surveyor-general, they are examined and officially platted, and if found correct, the plat and field-notes are approved. The surveyor-general prepares an original plat, which is forwarded to the general land office and photo-lithographed, and the original plat and three copies are returned to the surveyor-general, to be disposed of in accordance with paragraph 34 of the Mining Regulations.[46]

In approving mineral surveys the surveyor-general's office is not concerned with the fact that surface conflicts are shown with prior surveys. While these conflicts should be noted, the respective rights of the parties to the conflict area involve questions of title which cannot be passed upon by the surveyor-general. They are the subject of adverse claims,[47] if unpatented. If patented, the area in conflict will be excluded in the junior patent when issued.

[44] Clark's Pocket Quartz Mine, 27 L. D. 351; Copper Glance Lode, 29 L. D. 542; Zephyr Lode, 30 L. D. 510; *post*, § 673.

[45] For a discussion of the manner of apportionment, see § 673, *post*.

[46] Instructions, July 29, 1911, 40 L. D. 216. Amended in so far as it applies to Alaska, 41 L. D. 294. A certain number of photo-lithographic copies are also furnished the surveyor-general for sale at thirty cents each.

[47] Commrs. Letter, 8 Copp's L. O. 104; 5 Copp's L. O. 18, 51.

The claimant is furnished with a set of the approved field-notes and copies of the plat, for filing in the local land office and posting upon the claim. A copy of the plat is also transmitted by the surveyor-general to the register of the land office.[48]

Should the surveyor-general refuse to approve a survey, an appeal lies to the commissioner of the general land office, and from him to the secretary of the interior.

§ 672. The survey of placer claims—Descriptive report.—Where placer claims are upon surveyed lands and conform to legal subdivisions, no further survey or plat is required. In such cases the surveyor-general has no duty to perform.[49] Where such claims are upon unsurveyed lands, or being upon surveyed lands it is not practicable to make them conform to the public surveys,[50] a mineral survey is required, as in the case of lode claims.[51] The fractional lots on the north and west of a township, or those made fractional by segregation and patenting of lode mining claims, are not capable of legal subdivision. One locating, for instance, the east half of lot 1 in a given township would be compelled to have an official survey made.[52] In obtaining the order for such survey, and in executing it, the same formalities are observed as in those of lodes, with such slight modifications as are obviously necessary by reason of the differences between the two classes of deposits.

[48] Min. Reg., par. 34, Appendix, and Instructions, 40 L. D. 216.

[49] Gen. Min. Reg., par. 58, Appendix; In re Gerhauser, 7 L. D. 390; Draper v. Wells, 25 L. D. 550.

[50] *Ante*, § 448.

[51] Min. Reg., par. 58, Appendix.

[52] Holmes Placer, 29 L. D. 368; Chicago Placer Min. Claim, 34 L. D. 9.

In the case of placers, the deputy is required to add to his field-notes a descriptive report upon the quality and composition of the soil, the kind and amount of timber and other vegetation growing thereon, the *locus* and size of streams, and such other matters as may appear upon the surface of the claim.[53] He is also required to report as to the use or adaptability of the claim for placer mining; whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose,—also the proximity of the claim to the centers of trade or residence and neighboring well-known lode systems or individual lodes, the character and extent of all surface and underground workings, whether placer or lode, those works and expenditures made by claimant and the true situation of all mines, salt licks, salt springs, and millsites.[54] This report must be under oath, and is required to be corroborated,[55] and in the absence of anything attacking the *bona fides* of the claimant is sufficient to establish the character of the land.[56]

Where gulch claims which do not conform to legal subdivisions are sought to be patented, the department requires the deputy surveyor to report on the topographic conditions and furnish such information as will enable the department to determine whether nonconformity is reasonable and justified. The report must be verified by the certificate of the surveyor-general.[57]

[53] Min. Reg., par. 167, Appendix.

[54] Id., par. 167.

[55] Id., par. 167.

[56] Lincoln Placer, 7 L. D. 81.

[57] Wood Placer Min. Claim (on review), 32 L. D. 401. For a full discussion of this question of conformity of placer claims to legal subdivisions, see *ante*, §§ 448, 448a, 448b. See, also, Min. Reg., par. 30.

If a lode exists within the placer, and is claimed by the placer claimant, it must be surveyed the same as if it were elsewhere situated,[58] although the plats of the placer and lode surveys may be combined and constitute but one plat.

§ 673. The surveyor-general's certificate as to expenditures.—The claimant is required at the time of filing his application for patent in the local land office, or at any time thereafter within the period of publication of the notice of such application, to file with the register a certificate of the United States surveyor-general, that five hundred dollars' worth of labor has been expended or improvements made upon the claim by the claimant or his grantors.[59]

This is a question between the applicant and the government. The courts have no concern with it in adverse suits.[60] It is a matter for protest, however.

The statutory expenditure required as a prerequisite to mineral patent must be shown to have been made upon or for the benefit of the claim as presented for patent. If within an excluded conflict area it will not be accepted.[61] Where application is made by a relocator, work done by the original locator cannot be estimated.[62]

[58] *Ante*, §§ 413–415.

[59] Rev. Stats., § 2325; 17 Stat. 92; Comp. Stats. 1901, p. 1429; 5 Fed. Stats. Ann. 31; Min. Reg., pars. 48, 49, Appendix.

[60] Stolp v. Treasury Gold Min. Co., 38 Wash. 619, 80 Pac. 817, 818. See, also, Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 86, 68 L. R. A. 833.

[61] Hidden Treasure Lode, 29 L. D. 156; S. C., on review, 29 L. D. 315.

[62] Yankee Lode, 30 L. D. 289; Russell v. Wilson Creek Cons. M. Co., 30 L. D. 321.

Improvements made prior to the location will not be available,[63] but a common improvement commenced prior to the location of some of the claims of a group may be extended for the benefit of the later locations.[64] Parties holding separate locations cannot, by consolidating the title, claim that improvements made on one of them prior to the consolidation shall be credited to the other claims of the consolidation.[65] The expenditure must be shown as to all claims involved, including those held without location under section twenty-three hundred and twenty-two of the Revised Statutes.[66]

It was at one time held by the department that the direction of the statute as to the time within which the certificate of the surveyor-general should be supplied was mandatory, and that a certificate filed after the period of publication would not be considered.[67] Later rulings, however, express the view that the specification as to the time of filing the certificate is merely directory.[68]

The statutory requirement that improvements of the required value must have been completed prior to the expiration of the period of publication is mandatory, however.[69]

63 Tough Nut No. 2 and Other Lode Claims, 36 L. D. 9.

64 Aldebaran Mining Co., 36 L. D. 551.

65 In re Head, 40 L. D. 135.

66 Barklage v. Russell, 29 L. D. 401.

67 Milton v. Lamb, 22 L. D. 339; White Cloud C. M. Co., 22 L. D. 252; Little Pet Lode, 4 L. D. 17.

68 Draper v. Wells, 25 L. D. 550; Floyd v. Montgomery, 26 L. D. 122; Hidden Treasure Lode, 29 L. D. 156; S. C., on review, 29 L. D. 315; Neilson v. Champagne M. Co., 29 L. D. 491. See Min. Reg., par. 160.

69 Stemmons v. Hess, 32 L. D. 220; Wood Placer M. Co. (on review), 32 L. D. 401. The statement is made in Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833, that patent improvements might be

Ordinarily, this certificate is appended by the surveyor-general to the approved field-notes, which are delivered to the claimant. This certificate is based upon the report of the deputy surveyor.[70]

In regard to the amount of expenditures necessary to be shown where application is made for a consolidation of claims, the land department at one time ruled that where an application for patent embraced several locations or claims held in common, constituting one entire claim, whether lode or placer, an expenditure of five hundred dollars under section twenty-three hundred and twenty-five of the Revised Statutes upon such entire claim embraced in the application would be sufficient, and need not be shown upon each of the locations included therein.[71]

By subsequent rulings, however, this has been changed, and the applicant is called upon to produce the certificate of the surveyor-general showing that an amount equal to five hundred dollars for each location has been so expended upon or for the benefit of the entire group.[72] The reasons supporting the changed

completed at any time before actually making final entry in the land office. This is clearly incorrect, especially in view of the fact that, as the decision also holds, "The court has nothing to do with the question. . . . . "

[70] Min. Reg., pars. 49, 50, Appendix.

[71] Good Return M. Co., 4 L. D. 221, abrogating the departmental regulation of December 9, 1882; Circ. Instructions, Dec. 14, 1884, 4 L. D. 374; Id., Mar. 24, 1887, 8 L. D. 505; Andromeda Lode, 13 L. D. 146.

[72] Min. Reg., par. 48; In re Hale, 28 L. D. 524; Tenderfoot Lode, 30 L. D. 200; Mayflower G. M. Co., 29 L. D. 7; Gillis v. Downey, 29 L. D. 83; Brady's Mortgagee v. Harris, 29 L. D. 89; Neilson v. Champagne M. Co., 29 L. D. 491; In re Dawson, 40 L. D. 17. In Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 1085, 74 Pac. 444 (S. C., in error, 197 U. S. 313, 25 Sup. Ct. Rep. 468, 49 L. ed. 770; but point not discussed), it is said *arguendo* that when a placer claim is located by an association of persons, e. g., an area of one hundred and

ruling are fully set forth in an opinion prepared by Assistant Attorney-General Van Devanter.[73]

There is no legal justification for an arbitrary apportionment by the surveyor-general of any particular segment of a common or "group" improvement for the benefit of any individual claim. In legal contemplation the term "common improvement" imports a single distinct entity, not subject to physical subdivision or apportionment. The benefit of such an improvement attaches to and becomes available for the claims as a body and not individually. Each claim benefited is entitled to its proportion of the value of the entire improvement.[74]

The patenting of a portion of the claims in the group and their subsequent disposal will not prevent the patenting of the remainder of the claims based upon their participation in such improvement at the time of its construction.[75]

Where other claims are located after the construction of a common improvement and forming an addition to the original group, such common improvement may be extended for the benefit of the additional claims, and work of the value of five hundred dollars only for each such additional claim need be performed.[76]

Where a portion only of the claims composing a group are applied for and a common improvement benefiting the entire group is relied on for patent expend-

sixty acres, five hundred dollars expended on the location is sufficient, whereas if there were eight separate twenty-acre individual locators, the amount required would be four thousand dollars.

73 27 L. D. 91.

74 In re Carretto, 35 L. D. 361.

75 Mountain Chief No. 8 Lode Claim, 36 L. D. 100.

76 Aldebaran Min. Co., 36 L. D. 551.

itures, the department should be fully advised as to the total number of claims in the group—of their common ownership and relative situations. These should ordinarily be delineated upon an authenticated plat, and, according to unreported decisions by the commissioner, an abstract of title of the entire group furnished with the first proceeding involving an application of credit arising from the common improvement, and should be referred to and supplemented in each subsequent patent proceeding where a like credit is sought to be established.[77]

In determining the value and availability of the improvements, the same rules should be followed as control the determination of value of the annual work.[78]

On a showing made of an expenditure for the common benefit of several locations embraced in one application, the department will not undertake to determine whether such plan of development will be effective or not, if it appears that the expenditure is made in good faith and for the purpose alleged.[79]

Where, by reason of insufficient patent improvements, one of the claims of a group applied for is eliminated from the patent proceedings, and thereby the contiguity of the remainder of the group is destroyed, nevertheless, provided due publication and posting has taken place, the noncontiguous portion of the group remaining will be allowed to proceed to entry and patent.[80]

The certificate of the surveyor-general is not binding upon the land department; but unless corrected by the

[77] In re Carretto, 35 L. D. 361.

[78] Copper Glance Lode, 29 L. D. 542. See Zephyr Lode, 30 L. D. 510; *ante*, § 635.

[79] Hughes v. Ochsner, 26 L. D. 540.

[80] In re Dawson, 40 L. D. 17.

department prior to patent, it must be taken as conclusive.[81]

Where a group application is made by several coowners, each applicant must be shown to have an interest in each and every claim supposed to be benefited by the common system of development.[82]

In the case of placer locations applied for in accordance with legal subdivisions, the proof of improvements must consist of the affidavit of two or more disinterested witnesses.[83]

[81] United States v. Iron S. M. Co., 128 U. S. 673, 685, 9 Sup. Ct. Rep. 195, 32 L. ed. 571. See United States v. King, 83 Fed. 188, 191.

[82] Black Lead Lode Extension, 32 L. D. 595. If an application for patent is rejected for failure to present a proper certificate of expenditures, it may be renewed by refiling and commencing publication and posting *de novo*, and the register will mark the original application as "refiled," from which new date it will be treated as a pending application, and in the absence of a date of refiling the first date of the new publication will be treated as the date of the renewal. Jawbone Lode, 34 L. D. 72.

[83] Min. Reg., par. 25, Appendix.

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